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11 Attorneys for Defendants
12 CITIGROUP INC., CITIMORTGAGE, INC. and
CITIBANK, N.A.

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15
16 MARK WINKLER, on behalf of himself and all
17 others similarly situated,

18 Plaintiff,

19 v.

20 CITIGROUP INC., a Delaware corporation;
21 CITIMORTGAGE, INC., a New York
corporation; and CITIBANK N.A.; and DOES 1
through 50, inclusive,

22 Defendants.

Case No. 09-cv-1999-BTM-CAB

**DECLARATION OF DEBRA
BOGO-ERNST IN SUPPORT OF
DEFENDANTS' MOTION FOR
TRANSFER TO THE NORTHERN
DISTRICT OF CALIFORNIA
PURSUANT TO 28 U.S.C. § 1404(a)**

[Filed concurrently with Notice of Motion
and Motion to Transfer Venue;
Memorandum of Points and Authorities in
support thereof]

Date: March 12, 2010
Time: 11:00 a.m.
Place: Courtroom 15
940 Front Street, 15th Floor
San Diego, CA 92101-8900

Honorable Barry Ted Moskowitz

Complaint Filed: September 11, 2009

DECLARATION OF DEBRA BOGO-ERNST

I, Debra Bogo-Ernst, declare as follows:

1. I am a member of the state bar of Illinois, a partner with the law firm of Mayer Brown LLP, and one of the attorneys principally responsible for the representation of Defendants Citigroup Inc., CitiMortgage, Inc. and Citibank, N.A. (collectively, "Defendants") in the above-captioned matter. I have personal knowledge of the following, and if called upon to do so, could and would testify competently and truthfully with respect thereto. I make this declaration in support of Defendants' Motion for Transfer to the Northern District of California Pursuant to 28 U.S.C. § 1404(a).

2. David Levin ("Levin") filed a complaint against Citibank, N.A. ("Citibank") on January 26, 2009 in the action entitled *Levin v. Citibank, N.A.*, C-09-0350 MMC ("Levin Action"), pending before Judge Maxine M. Chesney in the United States District Court for the Northern District of California.

3. The parties have submitted three sets of Case Management Statements to the Court in the Levin Action, and the Court held a Case Management conference on May 8, 2009. The parties have participated in three ADR Conferences before ADR Program Staff Attorney Robin W. Siefkin on April 30, 2009, August 13, 2009, and September 21, 2009.

4. On September 17, 2009, the Court entered an order dismissing Counts I, V, VI, VII, VIII, IX, and X of Levin's Complaint and also dismissing Counts IV and XI to the extent that they included a claim for injunctive relief. Levin filed an amended complaint on October 9, 2009.

5. On November 23, 2009, Citibank filed a motion to dismiss in the Levin Action, which is set for hearing on February 26, 2010.

6. Attached as Exhibit A is a true and correct copy of the September 17, 2009 Order dismissing substantial portions of the Levin complaint.

7. Attached as Exhibit B is a true and correct copy of the complaint filed on January 26, 2009 in the Levin Action.

1 8. Attached as Exhibits C, D, E and F are true and correct copies of the Joint Case
2 Management Statement filed on May 1, 2009, the Supplement to the Joint Case Management
3 Statements filed on May 7, 2009, the Joint Case Management Statement filed on September 14,
4 2009, and the Joint Case Management Statement filed on November 25, 2009 in the Levin
5 Action.

6 I declare under penalty of perjury under the laws of the United States of America that the
7 foregoing is true and correct.

8 Executed on the 14th day of December, 2009 in Chicago, Illinois.

9
10 DATED: December 14, 2009


Debra Bogó-Ernst

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID LEVIN,
Plaintiff,
v.
CITIBANK, N.A.,
Defendant

No. C-09-0350 MMC

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS; GRANTING
DEFENDANT'S MOTION TO STRIKE;
CONTINUING CASE MANAGEMENT
CONFERENCE**

Before the Court is defendant Citibank, N.A.'s ("Citibank") "Motion to Dismiss Each Claim and All of the Claims in Plaintiff's Complaint," filed June 5, 2009, and Citibank's "Motion to Strike Certain Allegations in Plaintiff's Complaint," filed June 5, 2009. Plaintiff David Levin ("Levin") has filed opposition to each motion, and Citibank has filed a reply to each opposition. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.¹

BACKGROUND

On July 7, 2006, Levin entered into an agreement with Citibank titled Home Equity Line of Credit Agreement and Disclosure ("HELOC"). (See Miller Decl. Ex. A at 1.)² Under the terms of the HELOC, Citibank provided Levin with a \$144,000 line of credit secured by

¹By order filed August 25, 2009, the Court took the motions under submission.

²The Court grants Citibank's unopposed request for judicial notice of the HELOC.

1 Levin's real property located in Oakland, California. (See id.) The HELOC provided that
2 Citibank "may prohibit additional extensions of credit or reduce [the] Credit Limit during any
3 period in which . . . [t]he value of the Property declines significantly below the Property's
4 appraised value for purposes of the Account." (See id. Ex. A at 5.)

5 In his complaint, Levin alleges that Citibank, on March 17, 2008, "reduced Levin's
6 credit limit by more than \$80,000 – to his balance on that date." (See Compl. ¶ 15.)
7 According to Levin, Citibank made its determination "through dubious automated valuation
8 models ('AVMs') and, in particular, by employing "an AVM that used unreliable or
9 inaccurate data." (See Compl. ¶¶ 3-4.) Levin also alleges he was not informed of
10 Citibank's determination until March 21, 2008, when he received from Citibank a letter
11 Citibank mailed to him on March 18, 2008 (see Compl. ¶¶ 15-16), which letter stated:

12 We have determined that home values in your area, including your home
13 value, have significantly declined. As a result of this decline, your home's
14 value no longer supports the current credit limit for your home equity line of
15 credit. . . . This reduction in your credit limit will remain in effect until the
value in your home has been sufficiently restored. In the future, if you believe
that market conditions in your home's area are improving and you wish to
request that your credit limit be increased, you must call us

16 (See Compl. ¶ 3.)

17 Levin further alleges that, on March 19, 2008, before he received the letter, he had
18 written two checks drawn against the HELOC line of credit, and that he subsequently was
19 required to pay "not sufficient funds" fees. (See Compl. ¶ 16.) Levin additionally alleges
20 that, in May 2008, he was "forced [] to find a replacement home equity line from another
21 lender," that he paid "substantial closing costs" to the other lender, and that, in connection
22 with his application to such other lender, Levin obtained an appraisal indicating that, as of
23 April 2008, the value of his home had declined "less than 10 percent" from its value in 2006
24 when the line of credit was opened (see Compl. ¶¶ 3, 20), an amount Levin alleges does
25 not suffice to constitute a "significant" decline (see Compl. ¶ 3). Thereafter, according to
26 Levin, when he used the replacement home equity line "to pay off and terminate" the
27 HELOC, Citibank assessed a "\$434 early termination fee" against Levin. (See Compl.
28 ¶ 20.)

DISCUSSION

Citibank moves to dismiss each count in the complaint and, additionally, to strike certain allegations from the complaint.

A. Motion to Dismiss

The complaint includes eleven counts, each of which Citibank argues is subject to dismissal.

1. Count I: Declaratory Relief Under TILA and Regulation Z

Under the Truth in Lending Act ("TILA"), a creditor may "[p]rohibit additional extensions of credit or reduce the credit limit applicable to an account under [an open end consumer credit] plan during any period in which the value of the consumer's principal dwelling which secures any outstanding balance is significantly less than the original appraisal value of the dwelling." See 15 U.S.C. § 1647(c)(2)(B). Similarly, under "Regulation Z," a creditor may "[p]rohibit additional extensions of credit or reduce the credit limit applicable to an agreement during any period in which [] [t]he value of the dwelling that secures the plan declines significantly below the dwelling's appraised value for purposes of the [home equity] plan." See 12 C.F.R. § 226.5b(f)(3)(vi).

Levin alleges Citibank sent "generic credit line freeze letters" to "thousands of HELOC mortgagees," including himself. (See Compl. ¶¶ 3, 23.) In Count I, Levin seeks, on behalf of himself and a class he seeks to represent, a declaration that Citibank's "use of AVMs and related mass reduction of HELOC credit limits, and/or failure to reinstate HELOC credit limits based on its own AVMs, violates TILA and Regulation Z." (See Compl. ¶ 37.) Citibank argues Levin lack standing to seek such declaratory relief.

A plaintiff has standing to seek equitable relief, such as a declaration that the defendant's conduct has violated the law, where he "has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that [he] will again be wronged in a similar way." See Bird v. Lewis & Clark College, 303 F.3d 1015, 1019 (9th Cir. 2002) (internal quotations and citations omitted). As noted, Levin alleges he terminated the HELOC after Citibank reduced the credit limits. Because Levin and Citibank

1 no longer have a contractual relationship of any type, and because Levin does not include
2 any allegation suggesting that, in the absence of such a relationship, there exists any
3 possibility Citibank will violate Levin's rights under TILA and/or Regulation Z in the future,
4 the Court finds Levin has failed to allege facts sufficient to support a claim for declaratory
5 relief. See id. at 1019-20 (holding plaintiff lacked standing to seek declaration college had
6 discriminated against her on basis of disability, where she had "since graduated" and did
7 not allege any plans to return as student).

8 Accordingly, Count I is subject to dismissal.

9 **2. Count II: Violation of TILA and Regulation Z**

10 In Count II, Levin alleges that, contrary to Citibank's letter, the property securing the
11 HELOC "did not decline significantly in value." (See Compl. ¶ 39.) In support thereof,
12 Levin, as set forth above, alleges that in connection with his application for a line of credit
13 from another lender, an appraisal of his property was conducted and that, according to said
14 appraisal, the value of his property, between the date on which the line of credit was
15 opened and April 2008, had declined "less than ten percent." (See Compl. ¶ 3.)

16 As noted, TILA and Regulation Z allow a creditor to reduce a credit limit if the "value"
17 of the "dwelling" securing the mortgage declines "significantly" below the value at which the
18 property was appraised at the time the line of credit was opened. See 15 U.S.C.
19 § 1647(c)(2)(B); 12 C.F.R. § 226.5b(f)(3)(vi)(A). In a supplement to Regulation Z in which
20 "official staff interpretations of Regulation Z" are set forth, the staff of the Federal Reserve
21 Board states as follows: "What constitutes a significant decline for purposes of
22 § 226.5b(f)(3)(vi)(A) will vary according to individual circumstances. In any event, if the
23 value of the dwelling declines such that the initial difference between the credit limit and the
24 available equity (based on the property's appraised value for purposes of the plan) is
25 reduced by fifty percent, this constitutes a significant decline in the value of the dwelling for

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1 purposes of § 226.5b(f)(3)(vi)(A).” See 12 C.F.R. Part 226, Supp. I, § 5b(f)(3)(vi) ¶ 6.³

2 In light of such interpretation, Citibank argues, Levin’s complaint is insufficient to
3 state a claim for the reason that Levin has not alleged the equity in his home did not decline
4 significantly. The Court disagrees. In essence, Citibank argues that Levin is required to
5 negate in his complaint a particular theory on which Citibank’s assertion of a significant
6 reduction in value could be based. If Citibank’s notice had set forth such theory, Citibank’s
7 position might be argued with more persuasive force. Because the law on which Citibank
8 relied in sending the subject notice contemplates a variety of individual circumstances
9 under which a finding of a significant decline can be predicated, however, Levin should not
10 be required to anticipate and endeavor to negate, in his complaint, the particular
11 circumstances underlying Citibank’s determination.

12 Accordingly, Citibank has failed to show Count II is subject to dismissal.

13 **3. Count III: Breach of Contract**

14 The HELOC, using language similar to that set forth in Regulation Z, provides that
15 “Citibank may prohibit additional extensions of credit or reduce [the] Credit Limit” under
16 specified circumstances, one of which is “[t]he value of the Property declines significantly
17 below the Property’s appraised value for purposes of the Account.” (See Miller Decl. Ex. A
18 at 5.)

19 As noted, Levin alleges Citibank sent him a letter setting forth its determination that
20 the value of Levin’s property had declined significantly. In Count III, Levin alleges Citibank
21 breached the terms of the HELOC by reducing his credit line, because the value of his
22 property had not declined significantly below the property’s appraised value. Citibank
23 argues that Levin’s allegations are insufficient to state a claim, again on the theory that
24 Levin is required to allege that the equity in his home did not decline significantly.

25
26 ³Consistent therewith, the HELOC does not define the phrase “declines
27 significantly,” but does provide one “example”: “[I]f the value of the Property declines such
28 that the initial difference between the Credit Limit and the available equity (based on the
Property’s appraised value) is reduced by fifty percent, such an event would constitute a
significant decline in the value of the Property.” (See Miller Decl. Ex. A at 5.)

1 The Court, for the reasons set forth above with respect to Count II, finds Levin is not
2 required, in his complaint, to negate all possible circumstances on which Citibank could
3 have based its determination that the value of Levin's property significantly declined.

4 Accordingly, Citibank has failed to show Count III is subject to dismissal.

5 **4. Count IV: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**

6 In Count IV, Levin alleges Citibank's violation of TILA constituted an "unlawful" act in
7 violation of § 17200 of the California Business & Professions Code. Citibank argues Count
8 IV is subject to dismissal because Levin has failed to allege a violation of TILA.

9 "[A] lender's violation of TILA can be an unfair business practice or act under
10 [§ 17200]." Pacific Shore Funding v. Lozo, 138 Cal. App. 4th 1342, 1347 (2006). Because
11 the Court, for the reasons set forth above with respect to Count II, finds Levin's TILA claim
12 is not subject to dismissal, the Court finds Citibank has failed to show the entirety of Count
13 IV is subject to dismissal on the ground asserted by Citibank.

14 To the extent Levin seeks as relief for such violation, however, an order "enjoining
15 [Citibank's] unfair competition" (see Compl. ¶ 57), Count VI is subject to dismissal. As
16 noted, a plaintiff has standing to seek equitable relief, such as an order enjoining the
17 defendant from engaging in certain conduct, where he "has suffered or is threatened with a
18 concrete and particularized legal harm, coupled with a sufficient likelihood that [he] will
19 again be wronged in a similar way." See Bird, 303 F.3d at 1019 (holding plaintiff who had
20 "since graduated" and did not allege any plans to return as student lacked standing to seek
21 order requiring college to "change its overseas program"). The Court, for the reasons set
22 forth above with respect to Count I, finds Levin has failed to allege sufficient facts to
23 establish his standing to seek the injunctive relief sought in Count IV.

24 **5. Count V: Breach of Implied Covenant of Good Faith and Fair Dealing**

25 As noted, Levin alleges Citibank made the determination to reduce his credit limit on
26 March 17, 2008 (see Compl. ¶ 15) and mailed him a letter so notifying him on March 18,
27 2008 (see id.), which letter he received on March 21, 2008 (see Compl. ¶ 16). Also, as
28 noted, Levin alleges that, on March 19, 2008, before he received the letter, he had written

1 two checks drawn against the HELOC line of credit and subsequently was required to pay
2 “not sufficient funds” fees. (See id.) In Count V, Levin alleges Citibank breached the
3 implied covenant of good faith and fair dealing implicit in the HELOC by reducing his credit
4 limit “without notice,” thus causing him to be liable for “not sufficient funds” fees. (See
5 Compl. ¶¶ 61-62.) Citibank argues Count V is subject to dismissal for the reason that the
6 conduct upon which the claim is based is addressed in a specific provision of the HELOC.

7 Under California law, the implied covenant of good faith and fair dealing “cannot
8 impose substantive duties or limits on the contracting parties beyond those incorporated in
9 the specific terms of their agreement.” See Guz v. Bechtel Nat’l, Inc., 24 Cal.4th 317, 349-
10 50 (2000). Consequently, where a plaintiff bases a claim for breach of the implied
11 covenant of good faith and fair dealing on the theory that the plaintiff is entitled to a
12 substantive right “beyond those to which the parties actually agreed, the claim is invalid,”
13 and where a plaintiff bases such a claim on the defendant’s failure to comply with the
14 “terms to which the parties did agree, it is superfluous.” See id. at 352.

15 Here, the HELOC includes the following provision, titled “Notices”:

16 All Notices provided for in the Agreement shall be in writing and shall be
17 deemed given (a) when delivered on a Business Day if delivered personally,
18 (b) on the day after deposit with any overnight courier if such date is a
19 Business Day, (c) three days after deposit in the United States mail, if
20 delivered by certified mail, return receipt requested, postage prepaid and
addressed to you at the address set forth on the first page of the Agreement
or addressed to Citibank at the customer service address shown on your
monthly statement.

21 (See Miller Decl. Ex. A at 7.)

22 Because the time by which Citibank is required to provide notice is addressed by an
23 express provision of the HELOC, Levin may not base a claim for breach of the implied
24 covenant of good faith and fair dealing on a theory Citibank failed to provide timely notice of
25 the subject determination.

26 Accordingly, Count V is subject to dismissal.⁴

27 ⁴Because the complaint contains no allegation that the manner in which Citibank
28 provided him notice violated the HELOC, the Court has not considered whether Levin could
state a breach of contract claim on the theory Citibank failed to comply with the above-

1 **6. Count VI: Fraudulent Concealment**

2 In Count VI, Levin alleges Citibank “failed to disclose to Levin . . . that it was
3 reducing [his] credit limit until after [he] wrote checks on [his] HELOC which incurred ‘not-
4 sufficient-funds’ fees” (see Compl. ¶ 66), and that Citibank’s “failure to disclose that it was
5 going to reduce the credit limits of Levin . . . constituted fraudulent concealment” (see
6 Compl. ¶ 67), and was “deceptive” (see Compl. ¶ 68). Citibank argues Count VI is subject
7 to dismissal because Levin has failed to plead his claim with the particularity required by
8 Rule 9(b) of the Federal Rules of Civil Procedure.

9 Under California law, “[c]oncealment is a species of fraud or deceit.” See Blickman
10 Turkus LP v. MF Downtown Sunnyvale, 162 Cal. App. 4th 858, 868 (2008). “The elements
11 of an action for fraud and deceit based on concealment are: (1) the defendant must have
12 concealed or suppressed a material fact, (2) the defendant must have been under a duty to
13 disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or
14 suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been
15 unaware of the fact and would not have acted as he did if he had known of the concealed
16 or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the
17 plaintiff must have sustained damage.” Id. (internal quotation, citation, and alteration
18 omitted). With respect to the third of the above-referenced elements, the plaintiff must
19 plead the concealment was “made by the defendant with the intent to induce action (or
20 inaction) by the plaintiff.” See id. at 869 (emphasis in original).

21 Here, as Citibank correctly notes, Levin fails to plead any facts to support a finding
22 that Citibank, by mailing notice of its determination after it made the determination, acted
23 with the intent to defraud Levin in any manner, much less that Citibank intended to induce
24 Levin to write checks that would not be honored. Levin’s conclusory reference to
25 “fraudulent concealment” and his stated conclusion that the delay in notification was
26 “deceptive” (see Compl. ¶¶ 67, 68) are insufficient. See In re Glenfed Sec. Litig., 42 F.3d

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quoted provision.

1 1541, 1547-48 (9th Cir. 1994) (holding “Rule 9(b) requires particularized allegations of the
2 circumstances constituting fraud”; further holding “it [is] insufficient to set forth conclusory
3 allegations of fraud”) (emphasis in original).

4 Accordingly, Count VI is subject to dismissal.

5 **7. Count VII: Violation of California’s UCL, Cal. Bus. & Prof. Code § 17200**

6 In Count VII, Levin alleges Citibank, by engaging in a “deceptive failure to disclose
7 that it was going to reduce the credit limits,” also engaged in “unfair competition.” (See
8 Compl. ¶¶ 73, 74.) In other words, Levin bases Count VII on the same theory as that
9 supporting Count VI. Indeed, the allegations supporting Count VI and Count VII are in all
10 material respects the same. (See Compl. ¶¶ 65-68; Compl. ¶¶ 71-74.)

11 A § 17200 claim based on a theory of a deceptive conduct is subject to Rule 9(b).
12 See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-27 (9th Cir. 2009) (affirming dismissal
13 of § 17200 claims based on theories of “fraudulent conduct” and “failure to disclose
14 information pertinent to consumers,” where plaintiff failed to allege claims in conformity with
15 Rule 9(b)). Here, the Court finds, for the reasons set forth above with respect to Count VI,
16 Count VII is subject to dismissal for failure to comply with Rule 9(b).

17 Moreover, to the extent Levin seeks an order “enjoining [Citibank’s] unfair
18 competition” (see Compl. ¶ 75), Count VII is subject to dismissal for the additional reasons
19 set forth above with respect to Count IV.

20 **8. Count VIII: Breach of Implied Covenant of Good Faith and Fair Dealing**

21 As noted, Levin alleges that after Citibank reduced his credit limit, he was “forced []
22 to find a replacement home equity line from another lender,” and that, when he used the
23 replacement home equity line “to pay off and terminate” the HELOC, Citibank assessed a
24 “\$434 early termination fee” against him. (See Compl. ¶ 20.) In Count VIII, Levin alleges
25 Citibank breached the implied covenant of good faith and fair dealing implicit in the HELOC
26 by charging him the early termination fee. (See Compl. ¶ 79.) Citibank argues Count VIII
27 is subject to dismissal because it had a contractual right to charge an early termination fee.

28 Under California law, the “implied covenant will only be recognized to further the

1 contract's purpose; it will not be read into a contract to prohibit a party from doing that
2 which is expressly permitted by the agreement itself." See Wolf v. Walt Disney Pictures
3 and Television, 162 Cal. App. 4th 1107, 1120 (2008). Stated otherwise, "if the defendant
4 did what it was expressly given the right to do, there can be no breach [of the implied
5 covenant]." See id.

6 Here, the HELOC, in a section titled "Early Closure Release Fee," provides as
7 follows:

8 If Citibank pays the closing costs to open your Account and, within 36 months
9 of the date of this Agreement, you request that your Account be closed or
10 take any other action which will result in a release of the Mortgage, you agree
11 to pay an early closure release fee which will consist of all costs Citibank
12 incurred to open your Account. These costs are disclosed as Closing Costs
13 on the first page of this Agreement.

14 (See Miller Decl. Ex. A at 4.)

15 The first page of the HELOC states that Citibank paid the total amount of \$434.25 in
16 "Closing Costs" when the HELOC was opened. (See id.) Further, the date of the HELOC
17 is July 7, 2006 (see id.), and Levin alleges he closed the HELOC in May 2008 (see Compl.
18 ¶ 20), a date less than 36 months thereafter. Consequently, Citibank was expressly
19 permitted by the terms of the HELOC to charge Levin a fee of \$434.

20 Accordingly, Count XIII is subject to dismissal.⁵

21 **9. Count IX: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**

22 As pleaded, Count IX is derivative of Count XIII. (See Compl. ¶¶ 83, 86 (challenging
23 Citibank's imposition of "early termination fees").) Accordingly, the Court finds, for the
24 reasons set forth above with respect to Count XIII, Count IX is subject to dismissal.

25 Moreover, to the extent Levin seeks an order "enjoining [Citibank's] unfair
26 competition" (see Compl. ¶ 90), Count IX is subject to dismissal for the additional reasons
27 set forth above with respect to Count IV.

28 ⁵If Levin establishes his claim that Citibank breached the terms of the HELOC by
improperly reducing the credit limit, however, it would appear Levin could recover the early
termination fee as part of his damages. Indeed, Levin has alleged the damages incurred
as a result of the alleged breach of contract include his payment of the early termination
fee. (See Compl. ¶ 49.)

1 **10. Count X: Breach of Implied Covenant of Good Faith and Fair Dealing**

2 In Count X, Levin alleges he paid Citibank an “annual fee to maintain [the] HELOC.”
3 (See Compl. ¶ 92.) Levin further alleges that Citibank breached the implied covenant of
4 good faith and fair dealing by improperly reducing his credit limit (see Compl. ¶ 94), thereby
5 depriving him of the “benefit of the bargain associated with [Citibank’s] annual fee” (see
6 Compl. ¶ 95).

7 As Citibank correctly notes, the alleged breach identified in Count X is the improper
8 reduction of Levin’s credit limit. In particular, Levin alleges that one result of such breach is
9 that he did not receive access to the full credit limit for the entirety of the year, even though
10 he paid an annual fee. Indeed, in Count III, Levin expressly seeks to recover, in the event
11 he establishes a breach of contract, “the lost benefit of the bargain on annual account
12 fees.” (See Compl. ¶ 49.)⁶

13 Accordingly, Count X is subject to dismissal as duplicative of Count III.

14 **11. Count XI: Violation of California’s UCL, Cal. Bus. & Prof. Code § 17200**

15 In Count XI, Levin alleges Citibank improperly reduced his credit limit. (See Compl.
16 ¶¶ 100.) As a result, Levin alleges, he was deprived of the “benefit of the bargain
17 associated with [Citibank’s] annual fee.” (See Compl. ¶ 101.) In other words, Count XI is
18 derivative of Count III.

19 Citibank argues Count XI is subject to dismissal because Levin has failed to allege a
20 viable substantive claim on which Count XI could be based. Because the Court, for the
21 reasons set forth above with respect to Count III, has found Levin’s breach of contract
22 claim is not subject to dismissal, and because Levin alleges the reduction of his credit limit
23 occurred as part of a unlawful practice by Citibank imposed on “thousands” (see Compl.
24 ¶ 3), the Court finds Citibank has failed to show Count XI is subject to dismissal on the
25 ground asserted by Citibank.

26 _____
27 ⁶Under the terms of the HELOC, Levin was required to pay a \$50 annual fee,
28 payable July 7 of each year. (See Miller Decl. Ex. A at 1, 3.) Because Levin had full use of
 the HELOC from July 2007 to March 17, 2008, it appears Levin is seeking a partial refund
 of the annual fee in the event he establishes a breach of contract.

1 To the extent Levin seeks an order “enjoining [Citibank’s] unfair competition” (see
2 Compl. ¶ 104), however, Count XI is subject to dismissal for the reasons set forth above
3 with respect to Count IV.

4 **B. Motion to Strike**

5 “The court may strike from a pleading . . . any redundant, immaterial, impertinent, or
6 scandalous matter.” Fed. R. Civ. P. 12(f). Citibank argues that certain paragraphs in the
7 complaint, or portions thereof, should be stricken as immaterial, impertinent and
8 scandalous.

9 In that regard, Citibank first argues ¶¶ 6 and 7 in the complaint should be stricken
10 because such paragraphs set forth alleged wrongdoing by Citigroup, Inc. (“Citigroup”),
11 which is not a party to the instant action. Consequently, Citibank argues, ¶¶ 6 and 7 are
12 immaterial. The Court agrees. The complaint does not allege that Citigroup itself had any
13 involvement or participation in any of the activity giving rise to the claims alleged by Levin
14 herein. Accordingly, ¶¶ 6 and 7 are subject to dismissal.

15 Second, Citibank argues that the following portions of ¶¶ 54, 85, and 99 are
16 immaterial and impertinent, and should be stricken:

17 Moreover, given all of the other allegations in this complaint, Defendant’s acts
18 alleged herein were unfair. Defendant’s misconduct is a thinly-veiled attempt
19 to limit its exposure to the risk of collapse in the United States housing
20 market. Defendant’s conduct is especially unfair because it contributed to the
mortgage meltdown that led to the current economic crisis. . . . Defendant
bears a measure of responsibility for the effects of the mortgage crisis on the
housing market, and on Levin’s home value in particular.

21 (See Compl. ¶ 54.)

22 Defendant’s misconduct is a thinly-veiled attempt to limit its exposure to the
23 risk of collapse in the United States housing market. Defendant’s conduct is
24 especially unfair because it contributed to the mortgage meltdown that led to
the current economic crisis. . . . Defendant bears a measure of responsibility
25 for the effects of the mortgage crisis on the housing market, and on Levin’s
home value in particular.

26 (See Compl. ¶ 85.)⁷

27 ⁷Paragraph 85 is set forth in Count IX, which, as discussed above, is subject to
28 dismissal. Said paragraph, however, is incorporated by reference in Count XI (see Compl.
¶ 97), which count will not be dismissed.

1 Defendant's misconduct is a thinly-veiled attempt to limit its exposure to the
2 risk of collapse in the United States housing market. Defendant's conduct is
3 especially unfair because it contributed to the subprime mortgage fiasco
4 which has lead to the current economic crisis generally and the recent
5 turbulence in the housing market in particular. Indeed, defendant played a
6 significant role in the current collapse in the mortgage market: it services,
7 originates, and owns billions of dollars worth of subprime mortgages.
8 Defendant bears a measure of responsibility for the effects of the subprime
9 mortgage bust on the housing market, and on Levin's home value in
10 particular. . . .

11 (See Compl. ¶ 99.)

12 The Court finds the above-quoted allegations constitute hyperbolic and conclusory
13 remarks that have no bearing on the question of whether Citibank, by reducing Levin's
14 credit limit, failed to comply with TILA, Regulation Z, and/or the terms of the HELOC.

15 Accordingly, the above-quoted portions of ¶¶ 54, 85, and 99 will be stricken from the
16 complaint.

17 CONCLUSION

18 For the reasons stated above:

19 1. Citibank's motion to dismiss is hereby GRANTED in part and DENIED in part, as
20 follows:

21 a. Counts I, V, VI, VII, VIII, IX, and X are hereby DISMISSED.

22 b. To the extent Counts IV and XI include a claim for injunctive relief, Counts
23 VI and XI are hereby DISMISSED.

24 c. In all other respects, the motion is DENIED.

25 2. Citibank's motion to strike is hereby GRANTED:

26 a. Paragraphs 6 and 7 are hereby STRICKEN.

27 b. The portions of ¶¶ 54, 85, and 99 quoted above (see, supra, at 12-13) are
28 hereby STRICKEN.

3. In the event Levin seeks to amend any or all of the dismissed counts to cure the
deficiencies identified above, Levin is hereby ordered to file a First Amended Complaint no
later than October 9, 2009. If Levin elects not to file a First Amended Complaint, the
instant action will proceed on the remaining claims in the initial complaint.

1 4. The Case Management Conference is hereby CONTINUED from September 25,
2 2009 to December 4, 2009. A Joint Case Management Statement shall be filed no later
3 than November 25, 2009.

4 **IT IS SO ORDERED.**

5
6 Dated: September 17, 2009



MAXINE M. CHESNEY
United States District Judge

EXHIBIT B

E-filing

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20 *Attorneys for Plaintiff*

21 **IN THE UNITED STATES DISTRICT COURT**
 22 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 23 **OAKLAND DIVISION**

24 DAVID LEVIN, an individual, on his own
 25 behalf and on behalf of all others similarly
 26 situated,

27 Plaintiff

28 v.

CITIBANK, N.A., a national banking
 association,

Defendant.

) Case No.

) **CLASS ACTION COMPLAINT**
) **AND JURY DEMAND**
)
)
)
)
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)
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)
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C09-00350

ADR

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NOTICE OF ASSIGNMENT
TO MAGISTRATE JUDGE SENT

1 David Levin ("Levin" or "Plaintiff"), for his complaint, alleges as follows upon
2 information and belief, based upon, *inter alia*, investigation conducted by and through his
3 attorneys, except as to those allegations pertaining to Plaintiff and his counsel personally,
4 which are alleged upon personal knowledge:

5 Introduction

6 1. This case is about Defendant's illegal and improper reduction of credit
7 limits on home equity lines across the country in a thinly-veiled, illegal attempt to limit its
8 exposure to the risk of collapse in the United States housing market by breaking its promises
9 to the homeowners who have obtained mortgages from Defendant. Defendant services,
10 originates, and owns billions of dollars worth of prime and subprime mortgages, including
11 the home equity lines of credit ("HELOCs") at issue in this Complaint.

12 2. Each member of the Class had a HELOC for which Defendant reduced the
13 available credit in a manner that was both illegal and grossly unfair. As a result of
14 Defendant's wrongful actions, Plaintiff Levin brings this class action on behalf of himself
15 and the putative class for actual damages and attorneys fees under the Truth-in-Lending Act
16 (15 U.S.C. § 1640(a)), damages for breach of contract, damages for breach of the implied
17 covenant of good faith and fair dealing, and equitable and injunctive remedies under
18 California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17203).

19 Nature of the Claim

20 3. As early as April 2008, Defendant began sending form letters to thousands of
21 homeowners with home equity lines of credit ("HELOCs") from Defendant which indicated
22 that the homeowners' lines of credit were being summarily lowered. For many of the
23 homeowners who received these letters, their home value had not declined significantly, but
24 Defendant nevertheless reduced the credit limits on the corresponding HELOCs. The letter
25 Defendant sent to Plaintiff stated:

26 We have determined that *home values in your area, including your home*
27 *value, have significantly declined.* As a result of this decline, *your home's*
28 *value no longer supports the current credit limit for your home equity line of*
credit. . . . This reduction in your credit limit will remain in effect until the
value in your home has been sufficiently restored. In the future, if you believe
that market conditions in your home's area are improving and you wish to

1 request that your credit limit be increased, you must call us . . .
2 (emphasis added). When Plaintiff called Defendant, Defendant informed Plaintiff that if he
3 sought to reinstate his credit limit he would have to obtain a formal appraisal at his own
4 expense. Defendant has not disclosed how it determined that these home values had
5 decreased. On information and belief, Defendant made this determination through dubious
6 automated valuation models ("AVMs"), which are computerized econometric models tied to
7 a database of information related to home values. Defendant sent these letters to many
8 homeowners whose home value had not declined significantly and reduced the credit limits
9 on the corresponding HELOCs. Indeed, the value of Plaintiff's own home in April 2008 had
10 not declined significantly (i.e., less than 10 percent) from its value in 2006, when the
11 HELOC was issued.

12 4. On information and belief, the basis of Defendant's letter was an AVM that
13 used unreliable or inaccurate data. The home loan industry made widespread use of the
14 AVMs in underwriting the loans which led to the current mortgage meltdown. Indeed, the
15 abuse and manipulation of AVMs to overvalue real estate (in order to justify larger loans and
16 correspondingly larger origination and/or transaction fees) has been widely criticized.
17 However, AVMs remain just as susceptible to manipulation now that the industry (including
18 Defendant) seeks to reduce their outstanding credit lines and their exposure to the housing
19 crisis they created.

20 5. Defendant's systematic, mass reduction on the limits on its HELOCs was
21 illegal and deceptive. Federal law only permits Defendant to reduce credit limits if an
22 individual home securing a HELOC loses a significant amount of its value, and federal
23 regulators have recently warned financial institutions that it would violate federal law to
24 "reduce the credit limits of all HELOC accounts in a geographic area in which real estate
25 values are generally declining without assessing the value of the collateral that secures each
26 affected HELOC account."

27 6. Defendant's conduct is especially troubling given the significant role it played
28 in the recent turbulence in the United States housing market. Indeed, in 2002, Defendant's

1 parent company (Citigroup Inc.) paid \$215 million to settle Federal Trade Commission
2 charges of systematic and widespread deceptive and abusive home equity lending practices.
3 At the same time, Citigroup's top decision-makers have profited handsomely. For instance,
4 Charles Prince (the CEO of Citigroup, Inc.) received a staggering \$110 million in cash, stock,
5 and stock options from 2002 to November 2007. When Mr. Prince retired in November 2007,
6 he received a cash bonus of \$10.4 million, retaining almost \$28 million in unvested stock and
7 stock options, in addition to being granted perquisites worth \$1.5 million per year for the
8 next five years.

9 7. Defendant's mass HELOC reductions are not only illegal and deceptive, but
10 they are deeply unfair. On October 3, 2008, Congress passed the Emergency Economic
11 Stabilization Act of 2008, Pub. L. No. 110-343. Under this legislation, the government
12 established the Troubled Assets Relief Program which will distribute an unprecedented \$700
13 billion bailout (funded on the backs of American taxpayers) to Defendant's parent company
14 (Citigroup Inc.) and some other improvident financial institutions. The rationale advanced for
15 this bailout is that it is needed to ensure liquidity in the financial markets in the face of the
16 meltdown of mortgage-backed securities. Citigroup alone will receive \$45 billion in capital
17 investments and guarantees for \$306 billion for its mortgage-backed securities. Despite its
18 professed need for these public funds, Citigroup has continued with profligate expenses like
19 paying \$400 million for the naming rights to the New York Met's stadium. In stark contrast,
20 Defendant's HELOC mortgagees, like all American consumers, are struggling in the faltering
21 economy. Defendant has deprived these mortgagors of a crucial source of consumer credit at
22 a critical time.

23 **Parties**

24 8. **Plaintiff David Levin:** David Levin is a resident of Oakland, California.
25 From July 2006 to May 2008, Mr. Levin had a HELOC from Defendant secured by his
26 personal residence. On March 17, 2008, Defendant reduced the credit limit on Mr. Levin's
27 HELOC virtually down to his outstanding balance as of that date without any prior notice to
28 him.

1 9. **Defendant Citibank, N.A.:** Citibank, N.A. ("Citibank") is a national banking
2 association with its main offices at 3900 Paradise Road, Suite 127, Las Vegas, Nevada
3 89109. Citibank is one of the country's largest banks and has 380 offices in this state, as well
4 as offices in Connecticut, Delaware, the District of Columbia, Florida, Illinois, Maryland,
5 Massachusetts, Nevada, New Jersey, New York, Pennsylvania, Texas, and Virginia.

6 **Jurisdiction and Venue**

7 10. Citibank is a national banking association whose head offices are in Nevada,
8 and can only be a citizen of Nevada under 28 U.S.C. § 1348 and *Wachovia Bank, N.A. v.*
9 *Schmidt*, 546 U.S. 303 (2006). This Complaint alleges claims on behalf of a national class of
10 home owners who are minimally diverse from Citibank. On information and belief, the
11 aggregate of these claims exceed the sum or value of \$5,000,000. This Court has subject
12 matter jurisdiction over this case under 28 U.S.C. § 1332(d)(2).

13 11. This Court has personal jurisdiction over the Defendant under Cal. Code Civ.
14 Proc. § 410.10 because some of the acts alleged herein were committed, and Levin incurred
15 his injury, in California (and, specifically, the Northern District of California).

16 12. Venue is also proper before this Court under 28 U.S.C. § 1391(a)(2), (c).

17 **Intradistrict Assignment**

18 13. A substantial part of the events which give rise to the claim occurred in the
19 place of Levin's residence, in Oakland, Alameda County. Under Local Rule 3-2(c), (d), this
20 civil action should be assigned to the Oakland division of the Northern District of California.

21 **Allegations as to Plaintiff's Individual Claims**

22 14. Defendant and Levin entered into a HELOC agreement in July 2006. Under the
23 terms of the HELOC, Defendant provided Levin a \$144,000 line of credit. Levin's HELOC was
24 secured by a mortgage (as that term is defined under Cal. Civ. Code 2920) on his primary
25 residence.

26 15. On March 17, 2008, without any warning whatsoever, Defendant reduced
27 Levin's credit limit by more than \$80,000 – to his balance on that date. On March 18, 2008,
28 Defendant sent a letter to Levin which stated that Defendant had "determined that home

1 values in your area, including your home value, have significantly declined. As a result of
2 this decline, your home's value no longer supports the current credit limit for your home
3 equity line of credit." Defendant's March 18 letter was Levin's first notice that Defendant
4 *had already reduced his credit line the day before.*

5 16. On or about March 19, 2008 and prior to receiving Defendant's March 18 letter,
6 Levin had written two checks drawn from his HELOC. Defendant did not honor these checks,
7 causing the payees of these checks to assess "not sufficient funds" fees against Levin. Levin
8 only received Defendant's letter on March 21, 2008.

9 17. After receiving Defendant's letter, Levin contacted Defendant by telephone.
10 Defendant informed Levin that it would only reinstate the original credit limits to his HELOC if
11 he obtained an appraisal, at his expense, which indicated his home value has sufficiently
12 recovered. Defendant did not indicate what valuation would suffice to reinstate the original
13 credit limit on Levin's HELOC.

14 18. Levin sustained a variety of damages from Defendant's wrongful acts. Under his
15 HELOC agreement with Defendant, Levin paid Defendant a \$50 annual fee to maintain an
16 account with Defendant. When Defendant reduced Levin's credit limit, it proportionately
17 reduced and diminished the benefit of the bargain Levin expected to realize from that fee.

18 19. Levin's HELOC with Defendant was his primary line of credit. Defendant's
19 unilateral reduction of the credit limits on Levin's HELOC dramatically lowered the ratio of
20 credit Levin had available to him to the outstanding balance on that credit. In turn, on
21 information and belief, Defendant's acts drove up his Credit Utilization Rate ("CUR"), a major
22 component of his credit rating. Defendant's acts damaged Levin's credit rating and increased
23 the cost of credit to him.

24 20. Defendant's reduced credit limits forced Levin to find a replacement home
25 equity line from another lender in May 2008. In connection with this replacement home equity
26 line, Plaintiff obtained a home appraisal indicating his home had lost significantly less than ten
27 percent of its value. Levin paid substantial closing costs (including fees for home appraisal and
28 mortgage origination) to obtain his replacement home equity line. When Levin used his new

1 home equity line to pay off and terminate his HELOC with Defendant, Defendant assessed a
2 \$434 early termination fee against Levin.

3 **Class Certification Allegations**

4 21. Plaintiff seeks certification of a class and four subclasses under Federal Rule
5 23(b)(2).

6 22. **Definition of the Class and Subclasses:** Pursuant to Federal Rule of Civil
7 Procedure 23, Levin brings this Complaint against Defendant on behalf of a class (the
8 "Class") of all persons nationwide who:

- 9 (a) had a home equity line of credit from Defendant, the credit limits of
10 which Defendant later reduced; and
11 (b) who received the same or substantially similar letters from Defendant
12 which indicated the equity line's credit limits were reduced because of
13 a decline in home values in their general area.

14 The first subclass ("TILA Subclass") consists of all Class members who have objective
15 evidence, specifically including a home appraisal by a properly licensed appraiser or home sale,
16 showing that the value of the home securing the HELOC had not declined significantly since the
17 origination of Defendant's HELOC. The second subclass ("NSF Subclass") consists of all Class
18 members who i) wrote checks from their HELOC before receiving notice that Defendant
19 reduced their line of credit, and ii) incurred damages (including "not-sufficient-funds" fees)
20 because Defendant did not honor these checks after it reduced their HELOC. The third subclass
21 ("ETF Subclass") consists of all Class members who obtained a HELOC from another lender
22 after receiving Defendant's letter and who were subsequently charged a early termination fee
23 by Defendant. A fourth subclass ("Annual Fee Subclass") consists of all Class members who
24 paid an annual fee to maintain their HELOC account with Defendant. Excluded from the Class
25 and Subclasses are 1) any Judge or Magistrate presiding over this action and members of
26 their families; 2) Defendant, Defendant's subsidiaries, parents, successors, predecessors, and
27 any entity in which Defendant or its parents have a controlling interest and their current or
28 former employees, officers and directors; and 3) persons who properly execute and file a
timely request for exclusion from the class and 4) the legal representatives, successors or

1 assigns of any such excluded persons.

2 23. **Numerosity:** The exact number of the members of the Class and Subclasses is
3 unknown and is not available to Levin, but it is clear that individual joinder is impracticable.
4 Defendant sent its generic credit line freeze letters (or substantially similar letters) to
5 thousands of HELOC mortgagors, and a substantial percentage of the recipients of these
6 letters fall into the definition of one or more of the Subclasses. Class Members can easily be
7 identified through Defendants' records and public records.

8 24. **Commonality:** Common questions of fact and law exist as to all members of
9 the Class and Subclasses and predominate over the questions affecting only individual
10 members. These common questions include:

- 11 (a) What were Defendant's criteria for reducing the credit limits on its
12 HELOCs;
- 13 (b) What were Defendant's methods for valuing the homes securing the
14 HELOCs which credit limits it reduced;
- 15 (c) Whether Defendant's reduction and failure to reinstate of the credit
16 limits on its HELOCs violated Regulation Z and/or TILA;
- 17 (d) Whether Defendant's reduction and failure to reinstate of the credit
18 limits breached the terms of its HELOCs;
- 19 (e) Whether Defendant's reduction and failure to reinstate of the credit
20 limits on its HELOCs was unfair;
- 21 (f) Whether Defendant's reduction of the credit limits on its HELOCs
22 without giving any prior notice of the same was deceptive;
- 23 (g) Whether Defendant's assessment of early termination fees against
24 persons who replaced their HELOC with Defendant with a HELOC
25 from another lender was unfair, illegal, or a breach of the implied
26 covenant of good faith and fair dealing;
- 27 (h) Whether Defendant reduction of the credit limits on its HELOCs
28 diminished the benefit of the bargain its mortgagors derived from
paying annual fees to maintain their HELOC accounts;
- (i) Whether Levin and the Class are entitled to relief, and the nature of
such relief.

25 25. **Typicality:** Levin's claims are typical of the claims of other members of the
26 Class and each separate Subclass, as Levin and other members sustained damages arising out
27 of the wrongful conduct of Defendant, based upon the same transactions which were made
28

1 uniformly to Levin and the public. The California law under which Levin's claims arise do
2 not conflict with the laws of any other state in any material way.

3 26. **Adequate Representation:** Plaintiff will fairly and adequately represent and
4 protect the interests of the members of the Class and each separate Subclass, and have
5 retained counsel who are competent and experienced in complex class actions. Plaintiff has
6 no interest antagonistic to those of the Class or any of the separate Subclasses, and Defendant
7 has no defenses unique to Plaintiff.

8 27. **Policies Generally Applicable to the Class:** This class action is also
9 appropriate for certification because Defendant has acted or refused to act on grounds
10 generally applicable to the Class and each separate Subclass, thereby making appropriate
11 final injunctive relief or corresponding declaratory relief with respect to the Class or
12 Subclasses as a whole. The policies of the Defendant challenged herein apply and affect
13 members of the Class and respective Subclasses uniformly, and Plaintiff's challenge of these
14 policies hinges on Defendant's conduct, not on facts or law applicable unique to Plaintiff.
15 The Class and the Subclasses are suitable for certification under Rule 23(b)(2) because the
16 damages sought are incidental to the declaratory and injunctive relief requested in this
17 Complaint.

18 28. **Predominance and Superiority:** This class action is appropriate for
19 certification because class proceedings are superior to all other available methods for the fair
20 and efficient adjudication of this controversy, as joinder of all members is impracticable. The
21 damages suffered by the individual members of the Class and Subclasses will likely be
22 relatively small, especially given the burden and expense of individual prosecution of the
23 complex litigation necessitated by Defendant's actions. It would be virtually impossible for
24 the individual members of the Class to obtain effective relief from the misconduct of
25 Defendant. Even if members of the Class themselves could sustain such individual litigation,
26 it would still not be preferable to a class action because individual litigation would increase
27 the delay and expense to all parties due to the complex legal and factual controversies
28 presented in this Complaint. By contrast, a class action presents far fewer management

1 difficulties and provides the benefits of single adjudication, economy of scale, and
2 comprehensive supervision by a single Court. Economies of time, effort, and expense will be
3 fostered and uniformity of decisions will be ensured.

4 **Count I: Declaratory Relief Under TILA and Regulation Z**
(on behalf of Levin and the Class)

5 29. Plaintiff incorporates the above allegations by reference.

6 30. The Truth-in-Lending Act ("TILA") and its implementing regulation
7 (Regulation Z) restrict Defendant from changing any of the terms of a mortgage or HELOC –
8 including the credit limit. 15 U.S.C. § 1647(c)(1); 12 C.F.R. § 226.5b(f)(3). The exception
9 relevant here permits Defendant to reduce the credit limits on its HELOCs "during any
10 period in which . . . [t]he value of the consumer's principal dwelling which secures any
11 outstanding balance is significantly less than the original appraisal value of the dwelling." 15
12 U.S.C. § 1647(c)(2)(B); 12 C.F.R. § 226.5b(f)(3)(vi)(A).

13 31. TILA and Regulation Z prohibit Defendant from reducing the credit limits on
14 its HELOCs unless the value of the home securing the credit line has actually declined
15 significantly. The Federal Reserve Board's Official Staff Commentary to Regulation Z
16 defines "significant decline" for purposes of § 226.5b(f)(3)(vi)(A) as a decline in home value
17 so that "the initial difference between the credit limit and the available equity (based on the
18 property's appraised value . . .) is reduced by fifty percent." The Official Staff Commentary
19 further states that Regulation Z "does not require a creditor to obtain an appraisal before
20 suspending credit privileges [but] a significant decline must occur before suspension can
21 occur." On August 26, 2008, the Office of Thrift Supervision issued official guidance that
22 warned it would violate Regulation Z to "*reduce the credit limits of all HELOC accounts in*
23 *a geographic area in which real estate values are generally declining without assessing the*
24 *value of the collateral that secures each affected HELOC account.*"

25 32. Before reducing the limits of its HELOCs, Defendant was legally required to
26 confirm that the value of each of the homes had in fact declined. Plaintiff alleges on
27 information and belief that, instead, Defendant used a variety of dubious AVMs based upon
28

1 fundamentally unreliable data (including the decline of home values in broad geographic
2 areas) to speculate about the value its mortgagors' homes and thus to justify the mass
3 reductions on its HELOC limits.

4 33. Moreover, TILA and Regulation Z prohibit such a reduction in a HELOC
5 credit limit except "during [the] period in which" a home's value has substantially declined.
6 Defendant thus has an ongoing obligation to monitor the value of the collateral securing its
7 loans – including the value of Levin's home. Defendant's letter indicates that the credit
8 freeze will remain in effect "until the value in [Plaintiff's] home has been sufficiently
9 restored," implying that Defendant recognized its obligation to monitor the value of Levin's
10 home. However, Defendant subsequently insisted that *Levin* pay for and obtain an favorable
11 appraisal if Levin wanted Defendant to reinstate his HELOC's original credit limit.
12 Defendant never indicated what valuation would be necessary to reinstate Levin's HELOC,
13 nor what it deemed a "significant decline" in value.

14 34. The appraisal Levin obtained in connection with his replacement HELOC
15 indicates that his home value has declined only marginally – not enough to justify a reduction
16 of his HELOC's credit limits. Defendant's failure to reinstate Plaintiff's HELOC raises one
17 of three implications:

- 18 (a) Defendant's AVM may be inherently flawed because it undervalues
19 properties, and should not be used to justify reductions of HELOC
credit limits;
- 20 (b) Defendant may not have been monitoring the value of Levin's home,
21 because it would reinstated his credit limits before he canceled his
HELOC and obtained a replacement HELOC;
- 22 (c) Defendant's AVM may have provided a favorable valuation of Levin's
23 home, but Defendant ignored it and failed to reinstate the credit limits
on Levin's HELOCs.

24 35. On information and believe, Defendant 1) only used AVMs to reduce the
25 credit limits on the Class's HELOCs, failed to continue to monitor the value of the Class's
26 homes, and insisted the Class obtain formal appraisal to reinstate their HELOCs and/or 2)
27 used inherently faulty AVMs that undervalue the Class's home to justify the reduction of the
28 credit limits on the Class member's HELOCs.

1 36. Plaintiff and the other members of the Class have suffered concrete, actual
2 harm from these practices. Defendant has indicated it will refuse and has refused to honor
3 checks drawn from HELOCs which exceed the improper reduction of credit limits which
4 Defendant imposed in connection with the letters alleged above.

5 37. The Class and Defendant have adverse legal interests, and there is a
6 substantial controversy between the Class and Defendant of sufficient immediacy and reality
7 to warrant the issuance of a declaratory judgment as to whether Defendant's mass reduction
8 of and subsequent failure to reinstate the credit limits for the Class's HELOCs violates TILA
9 and Regulation Z. Levin, on his own behalf and behalf of the other Class members, seeks a
10 declaratory judgment under 27 U.S.C. § 2201 that Defendant's use of AVMs and related
11 mass reduction of HELOC credit limits, and/or its failure to reinstate HELOC credit limits
12 based on its own AVMs, violates TILA and Regulation Z.

13 **Count II: Violation of the TILA and Regulation Z**
14 **(on behalf of Levin and TILA Subclass)**

15 38. Plaintiff incorporates the above allegations by reference.

16 39. Defendant reduced the credit limit for Levin and other TILA Subclass members'
17 HELOCs. Contrary to Defendant's explanation, the homes securing the HELOCs for Levin and
18 other TILA Subclass members did not decline significantly in value. As alleged above, the
19 explanation in Defendant's letters was merely pretextual. Alternatively, the value of the homes
20 securing the HELOCs for Levin and other TILA Subclass members was no longer in a
21 significant decline from the original valuation, and Defendant's failed to reinstate their credit
22 limits.

23 40. Defendant's reduction of and/or refusal to reinstate the credit limit for Levin and
24 other TILA Subclass members' HELOCs violated the Truth-in-Lending Act and Regulation Z.

25 41. Defendant's violations of the Truth-in-Lending Act and Regulation Z damaged
26 Levin and the other TILA Subclass members. These damages include early termination fees,
27 appraisal fees, replacement HELOC closing costs, the increased price of credit, the lost benefit
28 of the bargain on annual account fees, and "not sufficient fund" fees.

1 42. Levin, on his own behalf and behalf of the other TILA Subclass members, seeks
2 actual damages under 15 U.S.C. § 1640(a)(1), statutory damages under 15 U.S.C. §
3 1640(a)(2)(B), and costs of the action, together with a reasonable attorneys' fee under 15 U.S.C.
4 § 1640(a)(3).

5 **Count III: Breach of Contract**
6 **(on behalf of Levin and TILA Subclass)**

7 43. Plaintiff incorporates the above allegations by reference.

8 44. Levin and the other TILA Subclass members obtained HELOCs from
9 Defendant. The terms of these HELOCs constitute a contract between the TILA Subclass
10 members and Defendant.

11 45. The HELOCs contain a term which purports to provide Defendant the discretion
12 to reduce the credit limit "during any period in which . . . the value of the [home securing the
13 HELOC] declines significantly below the [home's] appraised value for purposes of the
14 Account." Defendant drafted the terms of the HELOCs, and the ambiguity in the phrase
15 "declines significantly" must be construed against Defendant.

16 46. Levin and the other TILA Subclass members performed under their HELOCs
17 with Defendant. They made the payments due to Defendant under the HELOC (including,
18 where appropriate, Defendant's early termination fee).

19 47. The credit limit under TILA Subclass members' HELOCs was a material term of
20 the contract between TILA Subclass members and Defendant. Defendant materially breached
21 the terms of the HELOCs by reducing the credit limit for Levin and other TILA Subclass
22 members' HELOCs because their home value did not decline significantly. Alternatively,
23 Defendant materially breached the terms of the HELOCs by failing to reinstate the credit limit
24 for Levin and other TILA Subclass members' HELOCs after the value of the homes securing
25 the HELOCs for Levin and other TILA Subclass members was no longer in a significant
26 decline.

27 48. To the extent that any of the TILA Subclass members' HELOCs contain any
28 term purporting to allow Defendant to unilaterally reduce the credit limit of TILA Class

1 members without complying with TILA and Regulation Z, such terms are void and violate
2 public policy.

3 49. Defendant's breach of contract damaged Levin and the other TILA Subclass
4 members. These damages include early termination fees, appraisal fees, replacement HELOC
5 closing costs, the increased price of credit, the lost benefit of the bargain on annual account fees,
6 and "not sufficient fund" fees.

7 50. Levin, on his own behalf and behalf of the other TILA Subclass members,
8 seeks damages for Defendant's breach of contract, as well as interest and attorney's fees and
9 costs pursuant to Cal. Code Civ. Proc. § 1021.5.

10 **Count IV: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**
11 **(on behalf of Levin and TILA Subclass)**

12 51. Plaintiff incorporates the above allegations by reference.

13 52. Defendant's reduction of and/or failure to reinstate the original credit limits
14 for Levin and other TILA Subclass members' HELOCs violated TILA and Regulation Z.
15 Defendant sent a form letter to each of the Appraisal Class members which stated:

16 We have determined that home values in your area, including your home
17 value, have significantly declined. As a result of this decline, your
18 home's value no longer supports the current credit limit for your home
equity line of credit. . . . In the future, if you believe that market
conditions in your home's area are improving and you wish to request
that your credit limit be increased, you must call us

19 53. Defendant's form letters were deceptive and untrue because they were based
20 on AVMs which recklessly or intentionally undervalued the homes securing the TILA
21 Subclass's HELOCs. On information and belief, Defendant either recklessly used AVMs which
22 did not have adequate safeguards to ensure their integrity or intentionally manipulated AVMs to
23 justify reducing Levin and other TILA Subclass members' HELOC credit limits. Moreover,
24 Defendant's use of these AVMs violated TILA and Regulation Z inasmuch as the AVMs were
25 not sufficient, reliable, or adequate grounds to justify Defendant's reduction of the HELOC
26 credit limits.

27 54. Moreover, given all of the other allegations in this Complaint, Defendant's
28 acts alleged herein were unfair. Defendant's misconduct is a thinly-veiled attempt to limit its

1 exposure to the risk of collapse in the United States housing market. Defendant's conduct is
2 especially unfair because it contributed to the mortgage meltdown that led to the current
3 economic crisis. Defendant services, originates, and owns billions of dollars worth of
4 mortgages. Defendant bears a measure of responsibility for the effects of the mortgage crisis
5 on the housing market, and on Levin's home value in particular. In light of Defendant's
6 actions, its reduction of and/or failure to reinstate the TILA Subclass's HELOC credit limits
7 was unfair because it caused a substantial injury to consumers and competition that was not
8 outweighed by any countervailing benefits to consumers or to competition and was not an
9 injury the consumers themselves could reasonably have avoided. Moreover, Defendant's
10 reduction of and/or failure to reinstate the TILA Subclass's HELOC credit limits offends
11 public policy and/or violates the policy or spirit behind TILA, Regulation Z, Title XI of the
12 Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and the UCL, is
13 oppressive and unscrupulous, and threatens or harms competition in the post-bust HELOC
14 market.

15 55. These unlawful, deceptive, and unfair acts and practices are unfair competition
16 in violation of the UCL. Defendant's violations of the UCL caused Levin and the other TILA
17 Subclass members injury in fact, through lost money and property.

18 56. Defendant's violations of the UCL damaged Levin and the other TILA Subclass.
19 These damages occurred in the form of early appraisal fees, replacement HELOC closing costs,
20 the increased price of credit, the lost benefit of the bargain on annual account fees, and "not
21 sufficient fund" fees.

22 57. Levin, on his own behalf and behalf of the other TILA Subclass members, seeks
23 an order enjoining Defendant's unfair competition alleged herein, and restitution of any money
24 or property obtained by Defendant through such unfair competition under the UCL (Cal. Bus. &
25 Prof. Code § 17203), as well as interest and attorney's fees and costs pursuant to Cal. Code Civ.
26 Proc. § 1021.5.

27 **Count V: Breach of the Implied Covenant of Good Faith and Fair Dealing**
28 **(on behalf of Levin and NSF Subclass)**

1 58. Plaintiff incorporates the above allegations by reference.

2 59. Levin and the other NSF Subclass members obtained HELOCs from Defendant.
3 The terms of these HELOCs constitute a contract between the NSF Subclass members and
4 Defendant.

5 60. Implied in the terms of each of these HELOCs was a covenant of good faith
6 and fair dealing. This implied covenant prevents Defendant from engaging in conduct which
7 frustrates the NSF Subclass members' rights to the benefits of the contract or which would
8 injure the right of the NSF Subclass members' to receive the benefits of their HELOCs.

9 61. The credit limit was a material term of the NSF Subclass members' HELOCs.
10 Defendant breached the implied covenant of good faith and fair dealing in the HELOCs by
11 reducing the credit limit for Levin and other ETF Subclass members' HELOCs without notice.

12 62. Defendant's breach of contract caused Levin and other NSF Subclass members
13 to incur damages, including "not-sufficient-funds" fees which were charged by payees of checks
14 drawn from NSF Subclass members' HELOCs (and/or Defendant) and written after Defendant
15 reduced NSF Subclass members' credit line and before NSF Subclass members received notice
16 of the same.

17 63. Levin, on his own behalf and behalf of the other NSF Subclass members, seeks
18 damages for Defendant's breach of the implied covenant of good faith and fair dealing, as well
19 as interest and attorney's fees and costs pursuant to Cal. Code Civ. Proc. § 1021.5.

20 **Count VI: Fraudulent Concealment (on behalf of Levin and NSF Subclass)**

21 64. Plaintiff incorporates the above allegations by reference.

22 65. Levin and the other NSF Subclass members obtained HELOCs from Defendant.
23 The HELOCs contained credit limits. Prior to receiving Defendant's letter notifying them that
24 their HELOCs' credit limit had been reduced, Levin and the other NSF Subclass members had
25 an expectation or assumption that they would be able to write checks against the entire amount
26 of the HELOCs' credit limit. Having created this expectation or assumption, Defendant had a
27 duty to disclose to Levin and the other NSF Subclass members that it was going to reduce their
28 HELOCs' credit limit.

1 66. Defendant failed to disclose to Levin and the other NSF Subclass members that
2 it was reducing their HELOCs' credit limit until after they wrote checks on their HELOC which
3 incurred "not-sufficient-funds" fees. The credit limit available under their HELOCs was
4 material to the decision by Levin and the other NSF Subclass members to write checks out of
5 their HELOC after Defendant reduced those credit limits. If Levin and the other NSF Subclass
6 members had known that Defendant would dishonor their post-credit reduction checks, they
7 would not have written such checks.

8 67. Defendant's failure to disclose that it was going to reduce the credit limits of
9 Levin and the other NSF Subclass members' HELOCs was constituted fraudulent concealment.

10 68. Defendant's deceptive failure to disclose that it was going to reduce the credit
11 limits of Levin and the other NSF Subclass members' HELOCs damaged Levin and the other
12 NSF Subclass members. These damages took the form of "not-sufficient-funds" fees which
13 were charged by payees of checks drawn from NSF Subclass members' HELOCs (and/or
14 Defendant) and written after Defendant reduced NSF Subclass members' credit line and before
15 NSF Subclass members received notice of the same.

16 69. Levin, on his own behalf and behalf of the other NSF Subclass members, seeks
17 damages arising from Defendant's fraudulent concealment, as well as interest and attorney's
18 fees and costs pursuant to Cal. Code Civ. Proc. § 1021.5.

19 **Count VII: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**
20 **(on behalf of Levin and NSF Subclass)**

21 70. Plaintiff incorporates the above allegations by reference.

22 71. Levin and the other NSF Subclass members obtained HELOCs from Defendant.
23 The HELOCs contained credit limits. Prior to receiving Defendant's letter notifying them that
24 their HELOCs' credit limit had been reduced, Levin and the other NSF Subclass members had
25 an expectation or assumption that they would be able to write checks against the entire amount
26 of the HELOCs' credit limit. Having created this expectation or assumption, Defendant had a
27 duty to disclose to Levin and the other NSF Subclass members that it was going to reduce their
28 HELOCs' credit limit.

1 72. Defendant failed to disclose to Levin and the other NSF Subclass members that
2 it was reducing their HELOCs' credit limit until after they wrote checks on their HELOC which
3 incurred "not-sufficient-funds" fees. The credit limit available under their HELOCs was
4 material to the decision by Levin and the other NSF Subclass members to write checks out of
5 their HELOC after Defendant reduced those credit limits. If Levin and the other NSF Subclass
6 members had known that Defendant would dishonor their post-credit reduction checks, they
7 would not have written such checks.

8 73. Defendant's failure to disclose that it was going to reduce the credit limits of
9 Levin and the other NSF Subclass members' HELOCs was deceptive and constituted unfair
10 competition under the UCL. Defendant's violations of the UCL caused Levin and the other NSF
11 Subclass members injury in fact, through lost money and property.

12 74. Defendant's deceptive failure to disclose that it was going to reduce the credit
13 limits of Levin and the other NSF Subclass members' HELOCs damaged Levin and the other
14 NSF Subclass members. These damages took the form of "not-sufficient-funds" fees which
15 were charged by payees of checks drawn from NSF Subclass members' HELOCs (and/or
16 Defendant) and written after Defendant reduced NSF Subclass members' credit line and before
17 NSF Subclass members received notice of the same.

18 75. Levin, on his own behalf and behalf of the other NSF Subclass members, seeks
19 an order enjoining Defendant's unfair competition alleged herein, and restitution of any money
20 or property gained by the Defendant through such unfair competition under the UCL (Cal. Bus.
21 & Prof. Code § 17203), as well as interest and attorney's fees and costs pursuant to Cal. Code
22 Civ. Proc. § 1021.5.

23 **Count VIII: Breach of the Implied Covenant of Good Faith and Fair Dealing**
24 **(on behalf of Levin and ETF Subclass)**

25 76. Plaintiff incorporates the above allegations by reference.

26 77. Levin and the other ETF Subclass members obtained HELOCs from Defendant.
27 The terms of these HELOCs constitute a contract between the ETF Subclass members and
28 Defendant.

1 78. Implied in the terms of each of these HELOCs was a covenant of good faith
2 and fair dealing. This implied covenant prevents Defendant from engaging in conduct which
3 frustrates the ETF Subclass members' rights to the benefits of the contract or which would
4 injure the right of the ETF Subclass members' to receive the benefits of their HELOCs.

5 79. The credit limit was a material term of the ETF Subclass members' HELOCs.
6 Defendant breached the implied covenant of good faith and fair dealing in the HELOCs by
7 reducing and refusing to reinstate the credit limit for Levin and other ETF Subclass members'
8 HELOCs and then charging Levin and other ETF Subclass members early termination fees
9 when they replaced Defendant's HELOC with that of another lender, or simply terminated their
10 HELOCs after determining that they were not economical to maintain under the reduced credit
11 limits.

12 80. Defendant's breach of the implied covenant of good faith and fair dealing
13 damaged Levin and the other ETF Subclass members. These damages include Defendant's early
14 termination fees.

15 81. Levin, on his own behalf and behalf of the other ETF Subclass members, seeks
16 damages for Defendant's breach of the implied covenant of good faith and fair dealing, as well
17 as interest and attorney's fees and costs pursuant to Cal. Code Civ. Proc. § 1021.5.

18 **Count IX: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**
19 **(on behalf of Levin and ETF Subclass)**

20 82. Plaintiff incorporates the above allegations by reference.

21 83. Levin and the other ETF Subclass members obtained HELOCs from Defendant.
22 Defendant reduced the credit limit for Levin and other ETF Subclass members' HELOCs
23 without prior warning. Defendant charged Levin and other ETF Subclass members early
24 termination fees when they obtained a replacement HELOC from other lenders after receiving
25 Defendant's letter, or otherwise terminated their HELOCs.

26 84. On information and belief, Defendant has used an AVM to justify its reduction
27 of the credit limit for Levin and other ETF Subclass members' HELOCs. Defendant refuses to
28 reinstate the credit limits for the ETF Subclass's HELOCs without an appraisal. On information

1 and belief, Defendant recklessly used AVMs which did not have adequate safeguards to ensure
2 their integrity, intentionally manipulated AVMs to justify reducing Levin and other ETF
3 Subclass members' HELOC credit limits, and/or failing to revalue the homes of the ETF
4 Subclass using its own AVM to reinstate their credit limits.

5 85. Defendant's misconduct is a thinly-veiled attempt to limit its exposure to the risk
6 of collapse in the United States housing market. Defendant's conduct is especially unfair
7 because it contributed to the mortgage meltdown that led to the current economic crisis.
8 Defendant services, originates, and owns billions of dollars worth of mortgages. Defendant
9 bears a measure of responsibility for the effects of the mortgage crisis on the housing market,
10 and on Levin's home value in particular.

11 86. Defendant imposed the early termination fees after 1) its actions contributed to
12 the decline of home values across the country and 2) its reduction of credit limits forced Levin
13 and other ETF Subclass to seek replacement HELOCs. In light of Defendant's actions, its
14 imposition of early termination fees was unfair because it caused a substantial injury to
15 consumers and competition by punishing consumers for seeking alternate sources of home
16 equity credit and is not outweighed by any countervailing benefits to consumers or to
17 competition. Finally, the imposition of early termination fees is not an injury the consumers
18 themselves could reasonably have avoided.

19 87. Further, Defendant's imposition of early termination fees offends public policy
20 and/or violates the policy or spirit behind TILA, Regulation Z, and the UCL. Moreover, the
21 imposition of early termination fees is oppressive and unscrupulous, and threatens or harms
22 competition in the post-mortgage bust market for HELOCs. Defendant's early termination fees
23 also violate Cal. Civ. Code § 1671 as penalties.

24 88. These unfair acts and practices are unfair competition in violation of the UCL.
25 Defendant's violations of the UCL caused Levin and the other ETF Subclass members injury in
26 fact, through lost money and property.

27 89. Defendant's violations of the UCL have damaged Levin and the other ETF
28 Subclass members. These damages include Defendant's early termination fees.

1 90. Levin, on his own behalf and behalf of the other ETF Subclass members, seeks
2 an order enjoining Defendant's unfair competition alleged herein, and restitution of any money
3 or property gained by the Defendant through such unfair competition under the UCL (Cal. Bus.
4 & Prof. Code § 17203), as well as interest and attorney's fees and costs pursuant to Cal. Code
5 Civ. Proc. § 1021.5.

6 **Count X: Breach of the Implied Covenant of Good Faith and Fair Dealing**
7 **(on behalf of Levin and Annual Fee Subclass)**

8 91. Plaintiff incorporates the above allegations by reference.

9 92. Levin and the other Annual Fee Subclass members obtained HELOCs from
10 Defendant. The terms of these HELOCs constitute a contract between the Annual Fee Subclass
11 members and Defendant. Under the HELOCs, Levin and the other Annual Fee Subclass
12 members paid Defendant an annual fee to maintain their HELOC accounts. When Defendant
13 reduced their credit limits, it proportionately diminished the benefit of the bargain associated
14 with that fee.

15 93. Implied in the terms of each of these HELOCs was a covenant of good faith
16 and fair dealing. This implied covenant prevents Defendant from engaging in conduct which
17 frustrates the Annual Fee Subclass members' rights to the benefits of the contract or which
18 would injure the right of the ETF Subclass members' to receive the benefits of their
19 HELOCs.

20 94. On information and belief, Defendant has used an AVM to justify its
21 reduction of the credit limit for Levin and other Annual Fee Subclass members' HELOCs.
22 Defendant refuses to reinstate the credit limits for the Annual Fee Subclass's HELOCs
23 without an appraisal. On information and belief, Defendant recklessly used AVMs which did
24 not have adequate safeguards to ensure their integrity, intentionally manipulated AVMs to
25 justify reducing Levin and other Annual Fee Subclass members' HELOC credit limits, and/or
26 failing to revalue the homes of the Annual Fee Subclass using its own AVM to reinstate their
27 credit limits.

28 95. Defendant's breach of the implied covenant of good faith and fair dealing

1 damaged Levin and the other Annual Fee Subclass members. These damages include the lost
2 benefit of the bargain associated with Defendant's annual fee.

3 96. Levin, on his own behalf and behalf of the other ETF Subclass members,
4 seeks damages for Defendant's breach of the implied covenant of good faith and fair dealing,
5 as well as interest and attorney's fees and costs pursuant to Cal. Code Civ. Proc. § 1021.5.

6 **Count XI: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**
7 **(on behalf of Levin and Annual Fee Subclass)**

8 97. Plaintiff incorporates the above allegations by reference.

9 98. Levin and the other Annual Fee Subclass members obtained HELOCs from
10 Defendant. Under the HELOCs, Levin and the other Annual Fee Subclass members paid
11 Defendant an annual fee to maintain their HELOC accounts.

12 99. Defendant's misconduct is a thinly-veiled attempt to limit its exposure to the risk
13 of collapse in the United States housing market. Defendant's conduct is especially troubling
14 because it contributed to the subprime mortgage fiasco which has led to the current economic
15 crisis generally and the recent turbulence in the housing market in particular. Indeed, Defendant
16 played a significant role in the current collapse in the mortgage market: it services, originates,
17 and owns billions of dollars worth of subprime mortgages. Defendant bears a measure of
18 responsibility for the effects of the subprime mortgage bust on the housing market, and on
19 Levin's home value in particular. When Defendant reduced their credit limits, it proportionately
20 diminished the benefit of the bargain associated with that fee.

21 100. On information and belief, Defendant has used an AVM to justify its reduction
22 of the credit limit for Levin and other Annual Fee Subclass members' HELOCs. On information
23 and belief, Defendant breached the implied covenant of good faith and fair dealing in the
24 HELOCs by either recklessly using AVMs which did not have adequate safeguards to ensure
25 their integrity or intentionally manipulated AVMs to justify reducing Levin and other Annual
26 Fee Subclass members' HELOC credit limits. Defendant's use of AVMs deprived Levin and
27 other Annual Fee Subclass members of the benefit of the bargain associated with Defendant's
28 annual fee.

1 101. The imposition and failure to refund the annual fee was unfair because
2 Defendant's reduction of Levin and other Annual Fee Subclass members' HELOC credit limits
3 and use of AVMs deprived them of the benefit of the bargain associated with Defendant's
4 annual fee. This caused a substantial injury to consumers and competition that was not
5 outweighed by any countervailing benefits to consumers or to competition and was not an injury
6 the consumers themselves could reasonably have avoided. Moreover, Defendant's imposition
7 and failure to refund the annual fee offends public policy and/or violates the policy or spirit
8 behind TILA, Regulation Z, Title XI of the Financial Institutions Reform, Recovery, and
9 Enforcement Act of 1989, and the UCL, is oppressive and unscrupulous, and threatens or harms
10 competition in the post-mortgage bust market for HELOCs.

11 102. These unfair acts and practices are unfair competition in violation of the UCL.

12 103. Defendant's violations of the UCL damaged Levin and the other Annual Fee
13 Subclass members. These damages include the lost benefit of the bargain associated with
14 Defendant's annual fee. Defendant's violations of the UCL caused Levin and the other Annual
15 Fee Subclass members injury in fact, through lost money and property.

16 104. Levin, on his own behalf and behalf of the other Annual Fee Subclass members,
17 seeks an order enjoining Defendant's unfair competition alleged herein, and restitution of any
18 money or property gained by the Defendant through such unfair competition under the UCL
19 (Cal. Bus. & Prof. Code § 17203), as well as interest and attorney's fees and costs pursuant to
20 Cal. Code Civ. Proc. § 1021.5.

21
22 WHEREFORE, Plaintiff prays that the Court enter judgment and orders in their favor
23 and against Defendant as follows:

- 24 (a) Certifying the action as a class action and designating Plaintiff and his
25 counsel as representatives of the Class and Subclasses;
26 (b) Declaratory relief for the Class on Count I;
27 (c) Statutory damages under 15 U.S.C. § 1640(a)(2)(B) for the TILA
28 Subclass on Count II;
 (d) Actual damages for the TILA Subclass on Counts II to IV, including

1 early termination fees, appraisal fees, replacement HELOC closing costs,
2 the increased price of credit, the lost benefit of the bargain on annual
3 account fees, and "not sufficient fund" fees, actual damages on Count V
4 and Count VI for the NSF Subclass, including "not-sufficient-funds"
5 fees, actual damages on Count VIII for the ETF Subclass, including early
6 termination fees, and actual damages on Count X, including Defendant's
7 annual fees, in an amount to be proved at trial;

- 8 (e) Equitable and injunctive relief for the TILA Class on Count IV, Count
9 VII for the NSF Subclass, Count IX for the ETF Subclass, and Count XI
10 for the Annual Fee Subclass, including restitution of property gained by
11 the unfair competition alleged herein, and an order for accounting of
12 such property;
- 13 (f) An award of reasonable attorney's fees for Plaintiff and his counsel;
- 14 (g) Awarding pre- and post-judgment interest; and
- 15 (h) Granting such other and further relief as the Court may deem just and
16 proper.

17 Dated: January 26, 2009

18 By: 

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JURY TRIAL DEMAND

The Plaintiff hereby demands a trial by jury of all issues so triable.

Dated: January 23, 2009

By: _____

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EXHIBIT C

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Attorneys for Defendant, CITIBANK, N.A.

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

DAVID LEVIN, individually and on behalf of a
 class of similarly situated individuals,

Plaintiff,

v.

CITIBANK, N.A., a national banking association,

Defendant.

)
) CASE NO. C 09-00350 MMC

)
) **JOINT CASE MANAGEMENT**
) **STATEMENT**

)
) **CLASS ACTION**

)
) Complaint filed: January 26, 2009
) Judge: Hon. Maxine M. Chesney
) Hearing: May 8, 2009, 10:30 a.m.

JOINT CASE MANAGEMENT STATEMENT

JOINT CASE MANAGEMENT STATEMENT

EXHIBIT C

1 **1. Jurisdiction and Service:**

2 The parties agree that the Court has subject matter jurisdiction over this case under
3 federal question jurisdiction. Plaintiff alleges jurisdiction under the Class Action Fairness
4 Act, 28 U.S.C. § 1332(d)(2) as well. No issues exist with respect to personal jurisdiction or
venue and no parties remain to be served.

5 **2. Facts:**

6 Plaintiff David Levin alleges on behalf of himself and all others similarly situated that
7 Defendant Citibank improperly froze or suspended his Home Equity Line of Credit
8 (“HELOC”) in violation of both his HELOC agreement and applicable federal regulations.
9 Plaintiff alleges that Citibank used an improper valuation model to determine the value of
Plaintiff’s home securing the HELOC, that Plaintiff’s home did not decline significantly as
required before Citibank froze the HELOC, and that notice was not timely provided.

10 Mr. Levin alleges he incurred returned check fees, a reduced credit score and other
11 damages related to securing a new credit line from a different lender. Mr. Levin also alleges
12 that he was further injured when Citibank assessed an early termination fee against him.

13 Citibank denies each and every allegation made by Mr. Levin. Citibank maintains
14 that it complied with all applicable contractual, statutory and regulatory requirements in
appropriately and lawfully reducing Mr. Levin’s HELOC based on the decreased value of the
15 property and providing appropriate notice to Mr. Levin of the HELOC reduction. Citibank
denies that this case is suitable for class certification because, *inter alia*, every borrower’s
16 individual circumstances and property would need to be analyzed individually to make any
determination concerning each of the allegations and the defenses (which are, or may be,
17 different as to each member of the putative Class or putative Subclasses). Finally, Citibank
expressly denies that Mr. Levin and/or any putative class have been damaged and/or are
18 entitled to any damages.

19 Because Citibank has not yet formally responded to the Complaint, Mr. Levin
20 maintains that he is not in a position to comment on Citibank’s factual allegations at this
time.

21 **3. Legal Issues:**

22 The legal issues in this case include, without limitation:

- 23 a. The maintenance of this case as a class action under Rule 23 and
24 Citibank’s defenses thereto;
- 25 b. Whether Defendant’s actions related to HELOCs are consistent with its
26 loan agreements;
- 27 c. Whether Defendant’s actions related to of HELOCs are consistent with
28 federal regulations, specifically 12 C.F.R. § 226.5b(f);

- d. Whether Defendant's Notice procedures are consistent with 12 C.F.R. § 226.9;
- e. Whether Plaintiff Levin has standing to pursue his individual claims or those of the Class and alleged Sub-Classes;
- f. Whether Defendant appropriately assessed early termination fees;
- g. Whether Levin can maintain claims for damages and/or injunctive relief for alleged: (Counts I-II) Violations of TILA and Regulation Z, (III) Breach of Contract, (IV, VII, IX and XI) Violation of the UCL, Cal. Bus. & Prof. Code § 17200, (V, VIII and X) Breach of the Implied Covenant of Good Faith and Fair Dealing, (VI) Fraudulent Concealment and Defendant's defenses thereto; and
- h. Whether Plaintiff Levin complied with the terms of his loan agreement with Defendant.

4. Motions:

There are no pending motions. Plaintiff anticipates filing a motion for class certification and, if necessary, discovery-related motions.

Defendant Citibank may file a motion to dismiss the Complaint on or before the responsive pleading due date and, depending on the course of discovery, a motion for summary judgment later in the case.

5. Amendment of Pleadings:

Plaintiff does not anticipate the need to file any amendments to the pleadings at this time.

6. Evidence Preservation:

Plaintiff requests that Defendant, consistent with the Defendant's burden, preserve any and all relevant documents in their native format. Plaintiff intends to send a separate, more detailed document preservation and eDiscovery letter to the Defendant.

Defendant asserts it has already taken appropriate steps to preserve relevant evidence (including electronically stored information) by sending out a legal hold request promptly upon learning of this lawsuit.

7. Disclosures:

The Parties presently estimate that they will be able to make timely initial written disclosures two weeks after Defendant's responsive pleading due date. However, depending upon the discovery plan and for good cause shown, the Parties may request the Court to extend the time for written disclosures.

8. Discovery:

The Parties held a 26(f) conference on May 1, 2009. The Parties are working together to memorialize a joint discovery plan and will file a copy with the Court as soon as possible but no later than May 7, 2009.

Plaintiff anticipates that a substantial portion of the discovery in this case will involve eDiscovery. As will be discussed further during the Parties planned Rule 26(f) conference, Plaintiff proposes engaging in preliminary eDiscovery with the purpose of understanding Defendants' method of generating, storing and retrieving/searching electronic documents, its document retention policy, and repositories of electronically stored information. Plaintiff also anticipates eDiscovery will be necessary relating to Defendants' use of Automated Valuation Models for valuating real estate that serves as security for its HELOC loans.

Plaintiff further agrees that discovery in this case should be bifurcated between Class and merits discovery, with Class discovery proceeding first. In the event the Defendant files a motion to dismiss, Plaintiff reserves his right to seek discovery related to the motion, if necessary. Defendant likely will oppose such a request.

Defendant objects to any discovery pending the resolution of its anticipated motion to dismiss. Should discovery commence, Defendant agrees that it is appropriate to bifurcate class and merits discovery. However, Defendant does not agree with Plaintiff that "a substantial portion of the discovery in this case will involve eDiscovery." This process is often expensive, complicated, unduly burdensome, overbroad and potentially unnecessary. Defendant will examine and appropriately respond to Plaintiff's discovery requests. Defendant's position is that discovery should proceed in a tailored and reasonable way based upon the allegations in the Complaint. Defendant will strenuously object to costly, overly broad, unduly burdensome and/or irrelevant discovery, expressly including, but not limited to, eDiscovery.

9. Class Actions:

The Parties discussed the potential for a timeline for class certification briefing during the Rule 26(f) conference and agreed that, given the present status of the case, setting such a timeline at this point is premature. It is anticipated that the Defendant will ultimately oppose certification of the Class and Sub-Classes.

10. Related Cases:

Defendant contends that there is one related case at this time pending in the United States District Court for the Southern District of Ohio, Western Division: *Bailey v. Citibank, NA* (1:09-CV-278).

11. Relief:

Plaintiff seeks the following relief:

- (a) An order certifying the action as a Class Action and designating Plaintiff and his counsel as representatives of the putative Class and putative Subclasses;
- (b) Declaratory relief for the putative Class on Count I;
- (c) Statutory Damages under 15 U.S.C. § 1640(a)(2)(B) for the putative TILA Subclass on Count II;
- (d) Alleged actual damages for the putative TILA Subclass on Counts II to IV, equaling the sum of all early termination fees, appraisal fees, replacement HELOC closing costs, the increased price of credit as established by expert testimony or otherwise, the lost benefit of the bargain on annual account fees, and “not sufficient fund” fees, actual damages on Count V and Count VI for the putative NSF Subclass, including “not sufficient funds” fees, actual damages on Count VIII for the putative ETF Subclass, including early termination fees and actual damages on Count X, including Defendant’s annual fees, in and amount to be proven at trial;
- (e) Equitable and injunctive relief for the putative TILA Class on Count IV, Count VII for the putative NSF Subclass, Count IX for the putative ETF Subclass, and Count XI for the putative Annual Fee Subclass, including restitution of property allegedly gained by the unfair competition alleged in the Complaint and an order for account for such property;
- (f) An award of reasonable attorneys’ fees for Plaintiff and his counsel;
- (g) Awarding pre- and post-judgment interest; and
- (h) Granting such other and further relief as the Court may deem just and proper.

Defendant denies that Plaintiff or any other member of the putative class is entitled to any relief and/or damages. Accordingly, Defendant intends to oppose any and all of Plaintiff’s requested relief. In addition, Defendant intends to seek attorneys’ fees where appropriate. The Plaintiff denies Defendant is entitled to any such relief.

12. Settlement and ADR:

The Parties have had informal discussions regarding potential ADR. Plaintiff is willing to participate in any ADR, with a preference for a mediation. Defendant is open to informal discussions at this point but believes that it is premature for formal ADR at this time. Should informal discussions prove unsuccessful, Defendant will participate in the ADR procedures that seem most appropriate for this case.

13. Consent to Magistrate Judge for All Purposes:

Pursuant to Defendant’s filing of March 20, 2009 (Dkt. No. 5) all parties do not consent to proceed before a magistrate judge for all purposes.

14. Other References:

The Parties do not believe this case is suitable for reference to binding arbitration or a special master at this time. As to the suitability on the reference to the Judicial Panel on

1 Multidistrict Litigation, Defendant's position is that the proceedings are still in preliminary
2 stages and determinations on this issue have not been made.

3 **15. Narrowing of Issues:**

4 The Parties can discuss, through the discovery process and any dispositive motions,
5 the potential narrowing of issues.

6 **16. Expedited Schedule:**

7 This case is not suitable for an expedited process or streamlined procedures.

8 **17. Scheduling:**

9 The Parties intend to discuss proposed dates for the designation of experts, a
10 discovery cutoff, hearing of dispositive motions, pretrial conference and trial at some future
11 date. At this point, Plaintiff's position is that class discovery should be bifurcated from
12 merits-based discovery. In the event Defendant files a Motion to Dismiss, Plaintiff reserves
13 its right to seek discovery related to the Motion to Dismiss, if necessary. Defendant likely
14 will oppose such a request.

15 If Defendant files a motion to dismiss, it will seek a stay of discovery pending
16 resolution of the motion to dismiss. If Defendant answers, Defendant agrees that class
17 discovery should be bifurcated from merits-based discovery.

18 Plaintiff's position is that separate eDiscovery relating to Citibank's repositories of
19 electronically stored information relevant to this case should commence first for a period of
20 60 days. Following completion of eDiscovery, class discovery, followed by briefing on
21 Class certification issues, should then commence. Following a decision on Class
22 Certification, the case should proceed to merits-based discovery.

23 Defendant disagrees with Plaintiff's position on the progression of discovery,
24 including, but not limited to, eDiscovery. Defendant will examine and appropriately respond
25 to Plaintiff's discovery requests. Defendant's position is that discovery should proceed in a
26 tailored and reasonable way based upon the allegations in the Complaint. With respect to
27 eDiscovery specifically, this process is often expensive, complicated, unduly burdensome,
28 overbroad and potentially unnecessary. Defendant believes that a limited exchange of
information could be appropriate but, to simplify discovery and the Court's efficient
management of the case, Defendant needs to review Plaintiff's discovery requests before
responding to any document production request.

18. Trial:

Plaintiff anticipates a jury trial that would last approximately ten days to two weeks.

At this juncture and without knowing the scope of the issues (if any) that will proceed to trial, Defendant cannot reasonably estimate the length of trial. Defendant reserves its right to object to a jury trial to the extent inappropriately requested on any given claim.

19. Disclosure of Non-party Interested Entities or Persons:

Plaintiff knows of no person, firm, partnership, corporation or other entity to have either (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

Defendant states as follows:

1. The parent company of Citibank, N.A. is Citicorp Holdings, Inc.;
2. Citicorp Holdings, Inc. owns 100% of the stock of Citibank, N.A.;
3. The parent company of Citicorp Holdings, Inc. is Citigroup Inc.; and
4. Citigroup Inc. owns 100% of the stock of Citicorp Holdings, Inc.

20. Other Matters:

Other than a mediation, Plaintiff does not know of any other matter that may facilitate the just, speedy and inexpensive disposition of this matter.

Defendant is open to informal discussions at this point but believes that it is premature for formal ADR at this time. Should informal discussions prove unsuccessful, Defendant will participate in the ADR procedures that seem most appropriate for this case.

Dated: May 1, 2009

Dated: May 1, 2009

/s/ DAVID C. PARISI

/s/ DEBRA BOGO-ERNST

[Plaintiff's Counsel]

[Defendant's Counsel]

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EXHIBIT D

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24 dernst@mayerbrown.com

25 *Attorneys for Defendant, CITIBANK, N.A.*

26
27 **IN THE UNITED STATES DISTRICT COURT**
28 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

DAVID LEVIN, individually and on behalf of a
class of similarly situated individuals,

Plaintiff,

v.

CITIBANK, N.A., a national banking association,

Defendant.

)
) CASE NO. C 09-00350 MMC

)
) **SUPPLEMENT TO JOINT CASE**
) **MANAGEMENT STATEMENT**

)
) **CLASS ACTION**

) Complaint filed: January 26, 2009

) Judge: Hon. Maxine M. Chesney

) Hearing: May 8, 2009, 10:30 a.m.

SUPPLEMENT TO JOINT CASE MANAGEMENT STATEMENT

1 **8. Discovery:**

2 **26(f) Discovery Plan**

3 On May 1, 2009, the parties held a Rule 26(f) conference. The parties' discovery plan
4 is as follows:

5 **(A) Changes in the timing, form, or requirement for disclosures under Rule**
6 **26(a), including a statement of when initial disclosures were made or will be**
7 **made:**

8 The Parties presently agree that they will be able to make timely initial written
9 disclosures two weeks after Defendant's responsive pleading due date. However,
10 depending upon the discovery plan and for good cause shown, the Parties may request
11 the Court to extend the time for written disclosures.

12 **(B) The subjects on which discovery may be needed, when discovery should be**
13 **completed, and whether discovery should be conducted in phases or be limited to**
14 **or focused on particular issues;**

15 Plaintiff's position is that discovery should be conducted in phases. Plaintiff first asks
16 the Court for 60 days to conduct electronic discovery ("eDiscovery") related to the
17 method by which Citibank maintains its electronically stored information relevant to
18 this case. Following completion of this preliminary eDiscovery, plaintiff is willing to
19 allow the bifurcation of class discovery from merits discovery and engage in class
20 discovery with briefing on class certification issues thereafter. Following a decision
21 on class certification, the case should progress to merits-based discovery. Plaintiff is
22 willing to submit a brief in support of a separate period for eDiscovery should the
23 Court require such additional information.

24 Defendant objects to any discovery pending resolution of any motion to dismiss as
25 may be filed by Citibank. Should discovery commence, defendant agrees that it is
26 appropriate to bifurcate class and merits discovery and that merits and affirmative
27 defense discovery should be deferred until after the Court's ruling, if any, on class
28 certification. However, Defendant does not agree to unbridled eDiscovery during any
phase of the proceedings. This process is often expensive, complicated, unduly
burdensome, overbroad and potentially unnecessary. Defendant's position is that
discovery should proceed in a tailored and reasonable way based upon the allegations
in the Complaint. Defendant will strenuously object to costly, overly broad, unduly
burdensome and/or irrelevant discovery, expressly including, but not limited to,
eDiscovery.

In the event the Defendant files a motion to dismiss, plaintiff reserves his right to seek
discovery related to the motion, if necessary. Defendant likely will oppose such a
request.

1 **(C) Any issues about disclosure or discovery of electronically stored information,**
2 **including the form or forms in which it should be produced;**

3 Plaintiff sent Defendant a letter on May 5, 2009 outlining his “expectations regarding
4 eDiscovery and document preservation.” Defendant is in the process of reviewing the
5 letter and will consider the requests therein. At this point, the parties know that there
6 is one potential dispute related to the form of production: plaintiff will ask for
documents to be produced in native format, and defendant likely will oppose that
request. However, the parties will confer about these issues and bring any disputes to
the Court’s attention.

7 **(D) Any issues about claims of privilege or of protection as trial-preparation**
8 **materials, including — if the parties agree on a procedure to assert these claims**
9 **after production — whether to ask the court to include their agreement in an**
10 **order;**

11 Should discovery commence, the parties agree that a protective order is necessary to
12 encompass the production, disclosure and/or use, at the appropriate time, of any
13 confidential and/or proprietary information, and/or other protected personal, financial,
14 or private business information of Citibank or its customers, including but not limited
15 to information protected under the Gramm-Leach-Bliley Act. Defendant does not
16 believe that it is appropriate, prior to the Court’s ruling, if any, on class certification
to proceed with discovery directed to customer information. Defendant will provide a
draft protective order to plaintiff’s counsel, and the parties will work together to
hopefully present an agreed protective order to the Court so that the parties are ready
to address the production, disclosure and/or use of confidential, proprietary, and/or
other protected information at the appropriate time in the litigation.

17 **(E) Changes in the limitations on discovery imposed under these rules or by local**
18 **rule, and what other limitations should be imposed; and**

19 Due to the preliminary nature of this case, including the fact that Citibank has not yet
20 responded to the Complaint, the parties do not currently anticipate any changes to the
21 limitations on discovery imposed by these rules and/or by local rules. However, the
parties reserve their right to request any changes on discovery limitations as the case
progresses.

22 **(F) Any other orders that the court should issue under Rule 26(c) or under Rule**
23 **16(b) and (c).**

24 The Court should issue a protective order described in (D) above to cover the
25 production, disclosure and/or use of any confidential, proprietary, and/or other
26 protected personal, financial or business information of Citibank or its customers. The
27 parties do not contemplate any other orders at this time.
28

1 Dated: May 7, 2009

Dated: May 7, 2009

2 /s/ DAVID C. PARISI

/s/ DEBRA BOGO-ERNST

3 [Plaintiff's Counsel]

[Defendant's Counsel]

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11 *Attorneys for Plaintiff*

Attorneys for Defendant

12 DAVID LEVIN

Citibank, N.A.

PROOF OF SERVICE

I, Toby Emerson, the undersigned, hereby certify and declare:

I am over the age of 18 years and am not a party to the within cause. I am employed in the office of a member of the bar of this Court, at whose direction this service was made. My business address is Bartko, Zankel, Tarrant & Miller, 900 Front Street, Suite 300, San Francisco, California 94111.

On May 7, 2009, I served the true copy of the attached document(s) titled exactly

**• SUPPLEMENT TO JOINT CASE MANAGEMENT
STATEMENT**

on the interested parties in this action as follows:

_____ **BY MAIL:** I am readily familiar with my employer's mail collection and processing practices, know that said mail is collected and deposited with the United States Postal Service on the same day it is deposited in the interoffice mail, and know that postage thereon is fully prepaid. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope(s) at Bartko, Zankel, Tarrant & Miller, 900 Front Street, Suite 300, San Francisco, California 94111, addressed, sealed and charges prepaid as follows:

_____ **BY HAND DELIVERY:** I caused such envelope(s) by hand to the address designated below.

_____ **BY FEDERAL EXPRESS:** I am readily familiar with my employer's practice for collection and processing of Federal Express courier service mail, and know that said Federal Express courier service mail is collected and deposited with a facility regularly maintained by Federal Express at San Francisco, California on the same day it is deposited in the interoffice mail. Following ordinary business practice, I placed for collection and delivery to Federal Express such envelope(s) at Bartko, Zankel, Tarrant & Miller, 900 Front Street, Suite 300, San Francisco, California 94111, addressed, sealed and charges prepaid, marked for next business day delivery as follows:

_____ **BY FACSIMILE:** On March 20, 2009 from my employer's facsimile machine telephone number (415) 956-1152, I transmitted a copy of said document(s) to the following addressee(s) at the following number(s), which is the number last given by that person on a document he or she has filed in this action and served on my employer. The transmission was reported as complete and without error, and a transmission report properly issued by the transmitting machine, a true and correct copy of which is attached hereto pursuant to California Rule of Court, Rule 2008 (e)(4).

1 X **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on an agreement of the
2 parties to accept service by e-mail or electronic transmission, I caused the documents to
3 be sent to the persons at the e-mail addresses listed below. I did not receive, within a
 reasonable time after the transmission, any electronic message or other indication that
 the transmission was unsuccessful.

4 Jay Edelson, Esq.
5 KamberEdelson LLP
6 350 North LaSalle Street
7 Suite 1300
8 Chicago, IL 60654
9 jedelson@kamberedelson.com

10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct and that this declaration was executed on May 7, 2009 at San
12 Francisco, California.

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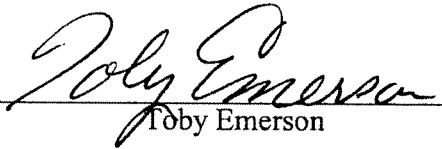

Toby Emerson

EXHIBIT E

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18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

20 DAVID LEVIN, individually and on behalf of a
21 class of similarly situated individuals,

22 Plaintiff,

23 v.

24 CITIBANK, N.A., a national banking association,

25 Defendant.

) CASE NO. C 09-00350 MMC

) **JOINT CASE MANAGEMENT**
) **STATEMENT**

) **CLASS ACTION**

) Complaint filed: January 26, 2009

) Judge: Hon. Maxine M. Chesney

) Hearing: September 25, 2009,

) 10:30 a.m.

28 **JOINT CASE MANAGEMENT STATEMENT**

CASE NO. C 09-00350 MMC

EXHIBIT E

1 **1. Jurisdiction and Service:**

2 The parties agree that the Court has subject matter jurisdiction over this case
3 under federal question jurisdiction. Plaintiff alleges jurisdiction under the Class Action
4 Fairness Act, 28 U.S.C. § 1332(d)(2) as well. No issues exist with respect to personal
5 jurisdiction or venue and no parties remain to be served.

6 **2. Facts:**

7 Plaintiff David Levin alleges on behalf of himself and all others similarly
8 situated that Defendant Citibank improperly froze or suspended his Home Equity Line of
9 Credit ("HELOC") in violation of both his HELOC agreement and applicable federal
10 regulations. Plaintiff alleges that Citibank used an improper valuation model to determine
11 the value of Plaintiff's home securing the HELOC, that Plaintiff's home did not decline
12 significantly as required before Citibank froze the HELOC, and that notice was not timely
13 provided.

14 Mr. Levin alleges he incurred returned check fees, a reduced credit score and
15 other damages related to securing a new credit line from a different lender. Mr. Levin also
16 alleges that he was further injured when Citibank assessed an early termination fee against
17 him.

18 Citibank denies each and every allegation made by Mr. Levin. Citibank
19 maintains that it complied with all applicable contractual, statutory and regulatory
20 requirements in appropriately and lawfully reducing Mr. Levin's HELOC based on the
21 decreased value of the property and providing appropriate notice to Mr. Levin of the HELOC
22 reduction. Citibank denies that this case is suitable for class certification because, *inter alia*,
23 every borrower's individual circumstances and property would need to be analyzed
24 individually to make any determination concerning each of the allegations and the defenses
25 (which are, or may be, different as to each member of the putative Class or putative
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1 Subclasses). Finally, Citibank expressly denies that Mr. Levin and/or any putative class have
2 been damaged and/or are entitled to any damages.

3 Citibank filed a Motion to Dismiss (Doc. No. 30) and a Motion to Strike
4 Certain Allegations in Plaintiff's Complaint ("Motion to Strike") (Doc. No. 40) on June 5,
5 2009. Plaintiff responded to both motions on July 24, 2009, and Citibank replied on August
6 13, 2009. Accordingly, the motions are fully briefed for the Court's consideration. On
7 August 25, 2009, the Court vacated the hearing on Defendants' Motion to Dismiss and to
8 Strike, finding the matters suitable for decision on the parties' respective filings.

9 **3. Legal Issues:**

10 The legal issues in this case include, without limitation:

11 a. The maintenance of this case as a class action under Rule 23 and
12 Citibank's defenses thereto;

13 b. Whether Defendant's actions related to HELOCs are consistent with
14 its loan agreements;

15 c. Whether Defendant's actions related to of HELOCs are consistent with
16 federal regulations, specifically 12 C.F.R. § 226.5b(f);

17 d. Whether Defendant's Notice procedures are consistent with 12 C.F.R.
18 § 226.9;

19 e. Whether Plaintiff Levin has standing to pursue his individual claims or
20 those of the Class and alleged Sub-Classes;

21 f. Whether Defendant appropriately assessed early termination fees;

22 g. Whether Levin can maintain claims for damages and/or injunctive
23 relief for alleged: (Counts I-II) Violations of TILA and Regulation Z, (III) Breach of
24 Contract, (IV, VII, IX and XI) Violation of the UCL, Cal. Bus. & Prof. Code § 17200, (V,
25 VIII and X) Breach of the Implied Covenant of Good Faith and Fair Dealing, (VI) Fraudulent
26 Concealment and Defendant's defenses thereto; and
27

1 h. Whether Plaintiff Levin complied with the terms of his loan agreement
2 with Defendant.

3 **4. Motions:**

4 As noted above, Citibank's Motion to Dismiss and Motion to Strike are fully
5 briefed and pending. Plaintiff anticipates filing a motion for class certification and, if
6 necessary, discovery-related motions. Depending on the course of discovery, Defendant
7 Citibank may file a motion for summary judgment later in the case.

8 **5. Amendment of Pleadings:**

9 Plaintiff does not anticipate the need to file any amendments to the pleadings
10 at this time.

11 **6. Evidence Preservation:**

12 Plaintiff requests that Defendant, consistent with the Defendant's burden,
13 preserve any and all relevant documents in their native format. Plaintiff sent a document
14 preservation and eDiscovery letter to the Defendant.

15 Defendant asserts it has already taken appropriate steps to preserve relevant
16 evidence (including electronically stored information) by sending out a legal hold request
17 promptly upon learning of this lawsuit. Defendant will respond to Plaintiff's eDiscovery
18 letter following the Court's ruling on its Motion to Dismiss and Motion to Strike.

19 **7. Disclosures:**

20 The Parties presently estimate that they will be able to make timely initial
21 written disclosures two weeks after the Court rules on Citibank's pending Motion to Dismiss
22 and Motion to Strike. However, depending upon the discovery plan and for good cause
23 shown, the Parties may request the Court to extend the time for written disclosures.

24 **8. Discovery:**

25 On May 1, 2009, the parties held a Rule 26(f) conference. The parties'
26 discovery plan is as follows:
27

1 **(A) Changes in the timing, form, or requirement for disclosures under**
2 **Rule 26(a), including a statement of when initial disclosures were made or will be made:**

3 The Parties presently agree that they will be able to make timely initial written
4 disclosures two weeks after the Court rules on Citibank's pending Motion to Dismiss and
5 Motion to Strike. However, depending upon the discovery plan and for good cause shown,
6 the Parties may request the Court to extend the time for written disclosures.

7 **(B) The subjects on which discovery may be needed, when discovery**
8 **should be completed, and whether discovery should be conducted in phases or be**
9 **limited to or focused on particular issues;**

10 Plaintiff's position is that discovery should be conducted in phases. Plaintiff
11 first asks the Court for 60 days to conduct electronic discovery ("eDiscovery") related to the
12 method by which Citibank maintains its electronically stored information relevant to this
13 case. Following completion of this preliminary eDiscovery, plaintiff is willing to allow the
14 bifurcation of class discovery from merits discovery and engage in class discovery with
15 briefing on class certification issues thereafter. Following a decision on class certification,
16 the case should progress to merits-based discovery. Plaintiff is willing to submit a brief in
17 support of a separate period for eDiscovery should the Court require such additional
18 information.

19 Defendant objects to any discovery pending resolution of the pending Motion
20 to Dismiss and Motion to Strike. Should discovery commence, defendant agrees that it is
21 appropriate to bifurcate class and merits discovery and that merits and affirmative defense
22 discovery should be deferred until after the Court's ruling, if any, on class certification.
23 However, Defendant does not agree to unbridled eDiscovery during any phase of the
24 proceedings. This process is often expensive, complicated, unduly burdensome, overbroad
25 and potentially unnecessary. Defendant's position is that discovery should proceed in a
26 tailored and reasonable way based upon the allegations in the Complaint. Defendant will
27
28

1 strenuously object to costly, overly broad, unduly burdensome and/or irrelevant discovery,
2 expressly including, but not limited to, eDiscovery.

3 **(C) Any issues about disclosure or discovery of electronically stored**
4 **information, including the form or forms in which it should be produced;**

5 Plaintiff sent Defendant a letter outlining his “expectations regarding
6 eDiscovery and document preservation.” Defendant is in the process of reviewing the letter
7 and will consider the requests therein. At this point, the parties know that there is one
8 potential dispute related to the form of production: plaintiff will ask for documents to be
9 produced in native format, and defendant likely will oppose that request. However, the
10 parties will confer about these issues and bring any disputes to the Court’s attention.
11 Defendant will respond to this letter following resolution of its Motion to Dismiss and
12 Motion to Strike.

13 **(D) Any issues about claims of privilege or of protection as trial-**
14 **preparation materials, including — if the parties agree on a procedure to assert these**
15 **claims after production — whether to ask the court to include their agreement in an**
16 **order;**

17 Should discovery commence, the parties agree that a protective order is
18 necessary to encompass the production, disclosure and/or use, at the appropriate time, of any
19 confidential and/or proprietary information, and/or other protected personal, financial, or
20 private business information of Citibank or its customers, including but not limited to
21 information protected under the Gramm-Leach-Bliley Act. Defendant does not believe that it
22 is appropriate, prior to the Court’s ruling, if any, on class certification to proceed with
23 discovery directed to customer information. Defendant will provide a draft protective order
24 to plaintiff’s counsel, and the parties will work together to hopefully present an agreed
25 protective order to the Court so that the parties are ready to address the production, disclosure
26
27
28

1 and/or use of confidential, proprietary, and/or other protected information at the appropriate
2 time in the litigation.

3 **(E) Changes in the limitations on discovery imposed under these rules**
4 **or by local rule, and what other limitations should be imposed; and**

5 Due to the preliminary nature of this case, the parties do not currently
6 anticipate any changes to the limitations on discovery imposed by these rules and/or by local
7 rules. However, the parties reserve their right to request any changes on discovery limitations
8 as the case progresses.

9 **(F) Any other orders that the court should issue under Rule 26(c) or**
10 **under Rule 16(b) and (c).**

11 The Court should issue a protective order described in (D) above. The parties
12 do not contemplate any other orders at this time.

13 **9. Class Actions:**

14 The Parties discussed the potential for a timeline for class certification
15 briefing during the Rule 26(f) conference and agreed that, given the present status of the
16 case, setting such a timeline at this point is premature. It is anticipated that the Defendant
17 will ultimately oppose certification of the putative Class and Sub-Classes.

18 **10. Related Cases:**

19 Defendant contends that there is one related case at this time pending in the
20 United States District Court for the Southern District of Ohio, Western Division: *Bailey v.*
21 *Citibank, NA* (1:09-CV-278).

22 **11. Relief:**

23 Plaintiff seeks the following relief:

- 24 (a) An order certifying the action as a Class Action and designating Plaintiff and
25 his counsel as representatives of the putative Class and putative Subclasses;
26 (b) Declaratory relief for the putative Class on Count I;
27

- 1 (c) Statutory Damages under 15 U.S.C. § 1640(a)(2)(B) for the putative TILA
2 Subclass on Count II;
- 3 (d) Alleged actual damages for the putative TILA Subclass on Counts II to IV,
4 equaling the sum of all early termination fees, appraisal fees, replacement
5 HELOC closing costs, the increased price of credit as established by expert
6 testimony or otherwise, the lost benefit of the bargain on annual account fees,
7 and “not sufficient fund” fees, actual damages on Count V and Count VI for
8 the putative NSF Subclass, including “not sufficient funds” fees, actual
9 damages on Count VIII for the putative ETF Subclass, including early
10 termination fees and actual damages on Count X, including Defendant’s
11 annual fees, in and amount to be proven at trial;
- 12 (e) Equitable and injunctive relief for the putative TILA Class on Count IV,
13 Count VII for the putative NSF Subclass, Count IX for the putative ETF
14 Subclass, and Count XI for the putative Annual Fee Subclass, including
15 restitution of property allegedly gained by the unfair competition alleged in
16 the Complaint and an order for account for such property;
- 17 (f) An award of reasonable attorneys’ fees for Plaintiff and his counsel;
- 18 (g) Awarding pre- and post-judgment interest; and
- 19 (h) Granting such other and further relief as the Court may deem just and proper.

20 Defendant denies that Plaintiff or any other member of the putative class is
21 entitled to any relief and/or damages. Accordingly, Defendant intends to oppose any and all
22 of Plaintiff’s requested relief. In addition, Defendant intends to seek attorneys’ fees where
23 appropriate. The Plaintiff denies Defendant is entitled to any such relief.

24 **12. Settlement and ADR:**

25 The Parties have had informal discussions regarding potential ADR. Plaintiff
26 is willing to participate in any ADR, with a preference for a mediation. Defendant is open to
27

1 informal discussions at this point but believes that it is premature for formal ADR at this
2 time. Should informal discussions prove unsuccessful, Defendant will participate in the
3 ADR procedures that seem most appropriate for this case. The parties appeared for a
4 telephonic conference pursuant to the Court's ADR Program on August 13, 2009 and are
5 scheduled to have an additional conference on September 21, 2009.

6 **13. Consent to Magistrate Judge for All Purposes:**

7 Pursuant to Defendant's filing of March 20, 2009 (Dkt. No. 5) all parties do
8 not consent to proceed before a magistrate judge for all purposes.

9 **14. Other References:**

10 The Parties do not believe this case is suitable for reference to binding
11 arbitration or a special master at this time. As to the suitability on the reference to the
12 Judicial Panel on Multidistrict Litigation, Defendant's position is that the proceedings are
13 still in preliminary stages and determinations on this issue have not been made.

14 **15. Narrowing of Issues:**

15 The Parties can discuss, through the discovery process and any dispositive
16 motions, the potential narrowing of issues.

17 **16. Expedited Schedule:**

18 This case is not suitable for an expedited process or streamlined procedures.

19 **17. Scheduling:**

20 The Parties intend to discuss proposed dates for the designation of experts, a
21 discovery cutoff, hearing of dispositive motions, pretrial conference and trial at some future
22 date. At this point, Plaintiff's position is that class discovery should be bifurcated from
23 merits-based discovery. Defendant filed a Motion to Dismiss and a Motion to Strike.
24 Accordingly, it is Defendant's position that discovery should be stayed pending resolution of
25 the motion to dismiss. If Defendant answers, Defendant agrees that class discovery should
26 be bifurcated from merits-based discovery.
27

1 Plaintiff's position is that separate eDiscovery relating to Citibank's
2 repositories of electronically stored information relevant to this case should commence first
3 for a period of 60 days. Following completion of eDiscovery, class discovery, followed by
4 briefing on Class certification issues, should then commence. Following a decision on Class
5 Certification, the case should proceed to merits-based discovery.

6 Defendant disagrees with Plaintiff's position on the progression of discovery,
7 including, but not limited to, eDiscovery. Defendant will examine and appropriately respond
8 to Plaintiff's discovery requests. Defendant's position is that discovery should proceed in a
9 tailored and reasonable way based upon the allegations in the Complaint. With respect to
10 eDiscovery specifically, this process is often expensive, complicated, unduly burdensome,
11 overbroad and potentially unnecessary. Defendant believes that a limited exchange of
12 information could be appropriate but, to simplify discovery and the Court's efficient
13 management of the case, Defendant needs to review Plaintiff's discovery requests before
14 responding to any document production request.

15 **18. Trial:**

16 Plaintiff anticipates a jury trial that would last approximately ten days to two
17 weeks.

18 At this juncture and without knowing the scope of the issues (if any) that will
19 proceed to trial, Defendant cannot reasonably estimate the length of trial. Defendant reserves
20 its right to object to a jury trial to the extent inappropriately requested on any given claim.

21 **19. Disclosure of Non-party Interested Entities or Persons:**

22 Plaintiff knows of no person, firm, partnership, corporation or other entity to
23 have either (i) a financial interest in the subject matter in controversy or in a party to the
24 proceeding; or (ii) any other kind of interest that could be substantially affected by the
25 outcome of the proceeding.

26 Defendant states as follows:
27
28

1. The parent company of Citibank, N.A. is Citicorp Holdings, Inc.;
2. Citicorp Holdings, Inc. owns 100% of the stock of Citibank, N.A.;
3. The parent company of Citicorp Holdings, Inc. is Citigroup Inc.; and
4. Citigroup Inc. owns 100% of the stock of Citicorp Holdings, Inc.

20. Other Matters:

Other than a mediation, Plaintiff does not know of any other matter that may facilitate the just, speedy and inexpensive disposition of this matter.

Defendant is open to informal discussions at this point but believes that it is premature for formal ADR at this time. Should informal discussions prove unsuccessful, Defendant will participate in the ADR procedures that seem most appropriate for this case.

Dated: September 14, 2009

Dated: September 14, 2009

/s/ DAVID C. PARISI

/s/ DEBRA BOGO-ERNST

[Plaintiff's Counsel]

[Defendant's Counsel]

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EXHIBIT F

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

JOINT CASE MANAGEMENT STATEMENT

Case No.: C 09-00350 MMC

EXHIBIT F

1 DAVID LEVIN, individually and on behalf of a
 2 class of similarly situated individuals,

3 Plaintiff,

4 v.

5 CITIBANK, N.A., a national banking association,

6 Defendant.

) CASE NO. C 09-00350 MMC

) **JOINT CASE MANAGEMENT**
) **STATEMENT**

) **CLASS ACTION**

) Complaint filed: January 26, 2009

) Judge: Hon. Maxine M. Chesney

) Hearing: December 4, 2009,
 10:30 a.m.

8 JOINT CASE MANAGEMENT STATEMENT

9 1. **Jurisdiction and Service:**

10 The parties agree that the Court has subject matter jurisdiction over this case under
 11 federal question jurisdiction. Plaintiff alleges jurisdiction under the Class Action Fairness
 12 Act, 28 U.S.C. § 1332(d)(2) as well. No issues exist with respect to personal jurisdiction or
 venue and no parties remain to be served.

13 2. **Facts:**

14 Plaintiff David Levin alleges on behalf of himself and all others similarly situated that
 15 Defendant Citibank improperly froze or suspended his Home Equity Line of Credit
 16 ("HELOC") in violation of both his HELOC agreement and applicable federal regulations.
 17 Plaintiff alleges that Citibank used an improper valuation model to determine the value of
 Plaintiff's home securing the HELOC, that Plaintiff's home did not decline significantly as
 required before Citibank froze the HELOC, and that notice was not timely provided.

18 Mr. Levin alleges he incurred returned check fees, a reduced credit score and other
 19 damages related to securing a new credit line from a different lender. Mr. Levin also alleges
 20 that he was further injured when Citibank assessed an early termination fee against him.

21 Citibank denies each and every allegation made by Mr. Levin. Citibank maintains
 22 that it complied with all applicable contractual, statutory and regulatory requirements in
 23 appropriately and lawfully reducing Mr. Levin's HELOC based on the decreased value of the
 24 property and providing appropriate notice to Mr. Levin of the HELOC reduction. Citibank
 25 denies that this case is suitable for class certification because, *inter alia*, every borrower's
 26 individual circumstances and property would need to be analyzed individually to make any
 determination concerning each of the allegations and the defenses (which are, or may be,
 different as to each member of the putative Class or putative Subclasses). Finally, Citibank
 expressly denies that Mr. Levin and/or any putative class have been damaged and/or are
 entitled to any damages.

1 Citibank filed a Motion to Dismiss (Doc. No. 30) and a Motion to Strike Certain
2 Allegations in Plaintiff's Complaint ("Motion to Strike") (Doc. No. 40) on June 5, 2009. The
3 Court granted in part and denied in part Citibank's Motion to Dismiss and granted Citibank's
4 Motion to Strike on September 17, 2009 (Doc. No. 57). On October 9, 2009, Plaintiff filed a
5 First Amended Complaint (Doc. No. 59), leaving intact those counts on which the Court
6 denied Citibank's Motion to Dismiss and pleading two additional Counts for alleged
7 violation of TILA and Regulation Z (Count II) and alleged violation of California's UCL,
8 Cal. Bus. & Prof. Code § 17200 (Count VI). (Doc. No. 59). On November 23, 2009,
9 Citibank filed a Motion to Dismiss the First Amended Complaint as to the two new Counts.
10 (Doc. No. 60).

11 **3. Legal Issues:**

12 The legal issues in this case include, without limitation:

- 13 a. The maintenance of this case as a class action under Rule 23 and
14 Citibank's defenses thereto;
- 15 b. Whether Defendant's actions related to HELOCs are consistent with its
16 loan agreements;
- 17 c. Whether Defendant's actions related to of HELOCs are consistent with
18 federal regulations, specifically 12 C.F.R. § 226.5b(f);
- 19 d. Whether Defendant's Notice procedures are consistent with 12 C.F.R. §
20 226.9;
- 21 e. Whether Plaintiff Levin has standing to pursue his individual claims or those
22 of the Class and alleged Sub-Classes;
- 23 f. Whether Defendant appropriately assessed early termination fees;
- 24 g. Whether Levin can maintain claims for damages and/or injunctive relief for
25 alleged: (Counts I-II) Violations of TILA and Regulation Z, (III) Breach of
26 Contract, and (IV, V and VI) Violation of the UCL, Cal. Bus. & Prof. Code §
27 17200; and
- 28 h. Whether Plaintiff Levin complied with the terms of his loan agreement with
Defendant.

4. Motions:

As noted above, Citibank's Motion to Dismiss the First Amended Complaint is pending. Given that the rules would require Plaintiff to file his opposition brief on Christmas eve and Citibank to file its reply brief on New Year's Eve day, Plaintiff requests until January 15, 2010 to respond to this motion, and Citibank requests until February 12, 2010 to file a reply brief in support of the motion.

Plaintiff anticipates filing a motion for class certification and, if necessary, discovery-related motions. Depending on the course of discovery, Defendant Citibank may file a motion for summary judgment later in the case.

1 **5. Amendment of Pleadings:**

2 As noted above, Plaintiff filed a First Amended Complaint on October 9, 2009. (Doc.
3 No. 59). Plaintiff does not anticipate the need to file any further amendments to the
4 pleadings at this time.

5 **6. Evidence Preservation:**

6 Plaintiff requests that Defendant, consistent with the Defendant's burden, preserve
7 any and all relevant documents in their native format. Plaintiff sent a document preservation
8 and eDiscovery letter to the Defendant.

9 Defendant asserts it has already taken appropriate steps to preserve relevant evidence
10 (including electronically stored information) by sending out a legal hold request promptly
11 upon learning of this lawsuit. Defendant will respond to Plaintiff's eDiscovery letter
12 following the Court's ruling on its Motion to Dismiss Plaintiff's First Amended Complaint.

13 **7. Disclosures:**

14 The Parties presently estimate that they will be able to make timely initial written
15 disclosures two weeks after the Court rules on Citibank's pending Motion to Dismiss
16 Plaintiff's First Amended Complaint. However, depending upon the discovery plan and for
17 good cause shown, the Parties may request the Court to extend the time for written
18 disclosures.

19 **8. Discovery:**

20 On May 1, 2009, the parties held a Rule 26(f) conference. The parties' discovery plan
21 is as follows:

22 **(A) Changes in the timing, form, or requirement for disclosures under Rule
23 26(a), including a statement of when initial disclosures were made or will be
24 made:**

25 The Parties presently agree that they will be able to make timely initial written
26 disclosures two weeks after the Court rules on Citibank's pending Motion to Dismiss
27 Plaintiff's First Amended Complaint. However, depending upon the discovery plan
28 and for good cause shown, the Parties may request the Court to extend the time for
29 written disclosures.

30 **(B) The subjects on which discovery may be needed, when discovery should be
31 completed, and whether discovery should be conducted in phases or be limited to
32 or focused on particular issues;**

33 Plaintiff's position is that discovery should be conducted in phases. Plaintiff first asks
34 the Court for 60 days to conduct electronic discovery ("eDiscovery") related to the
35 method by which Citibank maintains its electronically stored information relevant to
36 this case. Following completion of this preliminary eDiscovery, Plaintiff is willing to

1 allow the bifurcation of class discovery from merits discovery and engage in class
2 discovery with briefing on class certification issues thereafter. Following a decision
3 on class certification, the case should progress to merits-based discovery. Plaintiff is
willing to submit a brief in support of a separate period for eDiscovery should the
Court require such additional information.

4 Defendant objects to any discovery pending resolution of its Motion to Dismiss
5 Plaintiff's First Amended Complaint. Should discovery commence, defendant agrees
6 that it is appropriate to bifurcate class and merits discovery and that merits and
7 affirmative defense discovery should be deferred until after the Court's ruling, if any,
8 on class certification. However, Defendant does not agree to unbridled eDiscovery
9 during any phase of the proceedings. This process is often expensive, complicated,
10 unduly burdensome, overbroad and potentially unnecessary. Defendant's position is
that discovery should proceed in a tailored and reasonable way based upon the
allegations in the Complaint. Defendant will strenuously object to costly, overly
broad, unduly burdensome and/or irrelevant discovery, expressly including, but not
limited to, eDiscovery.

11 **(C) Any issues about disclosure or discovery of electronically stored information,**
12 **including the form or forms in which it should be produced;**

13 Plaintiff sent Defendant a letter outlining his "expectations regarding eDiscovery and
14 document preservation." Defendant is in the process of reviewing the letter and will
15 consider the requests therein. At this point, the parties know that there is one
16 potential dispute related to the form of production: Plaintiff will ask for documents to
17 be produced in native format, and defendant likely will oppose that request.
However, the parties will confer about these issues and bring any disputes to the
Court's attention. Defendant will respond to this letter following resolution of its
Motion to Dismiss Plaintiff's First Amended Complaint.

18 **(D) Any issues about claims of privilege or of protection as trial-preparation**
19 **materials, including — if the parties agree on a procedure to assert these claims**
20 **after production — whether to ask the court to include their agreement in an**
21 **order;**

22 Should discovery commence, the parties agree that a protective order is necessary to
23 encompass the production, disclosure and/or use, at the appropriate time, of any
24 confidential and/or proprietary information, and/or other protected personal, financial,
25 or private business information of Citibank or its customers, including but not limited
26 to information protected under the Gramm-Leach-Bliley Act. Defendant does not
27 believe that it is appropriate, prior to the Court's ruling, if any, on class certification
28 to proceed with discovery directed to customer information. Defendant will provide a
draft protective order to Plaintiff's counsel, and the parties will work together to
hopefully present an agreed protective order to the Court so that the parties are ready
to address the production, disclosure and/or use of confidential, proprietary, and/or
other protected information at the appropriate time in the litigation.

1 **(E) Changes in the limitations on discovery imposed under these rules or by local**
2 **rule, and what other limitations should be imposed; and**

3 Due to the preliminary nature of this case, the parties do not currently anticipate any
4 changes to the limitations on discovery imposed by these rules and/or by local rules.
5 However, the parties reserve their right to request any changes on discovery
6 limitations as the case progresses.

7 **(F) Any other orders that the court should issue under Rule 26(c) or under Rule**
8 **16(b) and (c).**

9 The Court should issue a protective order described in (D) above. The parties do not
10 contemplate any other orders at this time.

11 **9. Class Actions:**

12 The Parties discussed the potential for a timeline for class certification briefing
13 during the Rule 26(f) conference and agreed that, given the present status of the case, setting
14 such a timeline at this point is premature. It is anticipated that the Defendant will ultimately
15 oppose certification of the putative Class and Sub-Classes.

16 **10. Related Cases:**

17 Defendant contends that there are two related cases at this time pending: (1) in the
18 United States District Court for the Southern District of Ohio, Western Division: *Bailey v.*
19 *Citibank, NA* (1:09-CV-278); and (2) in the United States District Court for the Southern
20 District of California: *Winkler v. Citigroup, Inc. et al.* (09-CV-1999 BTM CAB).

21 **11. Relief:**

22 Plaintiff seeks the following relief:

- 23 (a) An order certifying the action as a Class Action and designating Plaintiff and
24 his counsel as representatives of the putative Class and putative Subclasses;
- 25 (b) Statutory Damages under 15 U.S.C. § 1640(a)(2)(B) for the putative TILA
26 Subclass on Count I and the putative NSF Subclass on Count II;
- 27 (c) Alleged actual damages for the putative TILA Subclass on Counts I and III,
28 equaling the sum of all early termination fees, appraisal fees, replacement
HELOC closing costs, the alleged increased price of credit as established by
expert testimony or otherwise, alleged adverse effects on credit scores, the
alleged denial of the full use of the bargained-for benefit of the HELOCs, the
alleged lost benefit of the bargain on annual account fees, and "not sufficient
fund" fees in and amount to be proven at trial;
- (d) Alleged actual damages for the putative NSF Subclass on Count II, equaling
the denial of the full use of the bargained-for benefit of the HELOCs, early

1 termination fees, appraisal fees, replacement HELOC closing costs, the
2 alleged increased price of credit, alleged adverse effects on credit scores, and
the alleged loss benefit of the bargain on annual account fees, in an amount to
be proven at trial;

3 (e) Restitution of any money or property obtained by Citibank from Plaintiff and
4 the members of the TILA Subclass, Annual Fee Subclass, and ETF Subclass
on Counts IV, V, and VI;

5 (f) An award of reasonable attorneys' fees for Plaintiff and his counsel;

6 (g) Awarding pre- and post-judgment interest; and

(h) Granting such other and further relief as the Court may deem just and proper.

7 Defendant denies that Plaintiff or any other member of the putative class is entitled to
any relief and/or damages. Accordingly, Defendant intends to oppose any and all of
8 Plaintiff's requested relief. In addition, Defendant intends to seek attorneys' fees where
appropriate. The Plaintiff denies Defendant is entitled to any such relief.

9
10 **12. Settlement and ADR:**

11 The Parties have had informal discussions regarding potential ADR. Plaintiff is
willing to participate in any ADR, with a preference for a mediation. Defendant is open to
12 informal discussions at this point but believes that it is premature for formal ADR at this
time. Should informal discussions prove unsuccessful, Defendant will participate in the
13 ADR procedures that seem most appropriate for this case. The parties appeared for
telephonic conferences pursuant to the Court's ADR Program on August 13, 2009 and
14 September 21, 2009 and are scheduled to have an additional conference on December 1,
15 2009.

16 **13. Consent to Magistrate Judge for All Purposes:**

17 Pursuant to Defendant's filing of March 20, 2009 (Dkt. No. 5), all parties do not
18 consent to proceed before a magistrate judge for all purposes.

19 **14. Other References:**

20 The Parties do not believe this case is suitable for reference to binding arbitration or a
special master at this time. As to the suitability on the reference to the Judicial Panel on
21 Multidistrict Litigation, Defendant's position is that the proceedings are still in preliminary
22 stages and determinations on this issue have not been made.

23 **15. Narrowing of Issues:**

24 The Parties can discuss, through the discovery process and any dispositive motions,
25 the potential narrowing of issues.

1 **16. Expedited Schedule:**

2 This case is not suitable for an expedited process or streamlined procedures.

3 **17. Scheduling:**

4 The Parties intend to discuss proposed dates for the designation of experts, a
5 discovery cutoff, hearing of dispositive motions, pretrial conference and trial at some future
6 date. At this point, Plaintiff's position is that class discovery should be bifurcated from
7 merits-based discovery. Defendant filed a Motion to Dismiss Plaintiff's First Amended
8 Complaint. Accordingly, it is Defendant's position that discovery should be stayed pending
9 resolution of the motion to dismiss. If Defendant answers, Defendant agrees that class
10 discovery should be bifurcated from merits-based discovery.

11 Plaintiff's position is that separate eDiscovery relating to Citibank's repositories of
12 electronically stored information relevant to this case should commence first for a period of
13 60 days. Following completion of eDiscovery, class discovery, followed by briefing on
14 Class certification issues, should then commence. Following a decision on Class
15 Certification, the case should proceed to merits-based discovery.

16 Defendant disagrees with Plaintiff's position on the progression of discovery,
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18 to Plaintiff's discovery requests. Defendant's position is that discovery should proceed in a
19 tailored and reasonable way based upon the allegations in the Complaint. With respect to
20 eDiscovery specifically, this process is often expensive, complicated, unduly burdensome,
21 overbroad and potentially unnecessary. Defendant believes that a limited exchange of
22 information could be appropriate but, to simplify discovery and the Court's efficient
23 management of the case, Defendant needs to review Plaintiff's discovery requests before
24 responding to any document production request.

25 **18. Trial:**

26 Plaintiff anticipates a jury trial that would last approximately ten days to two weeks.

27 At this juncture and without knowing the scope of the issues (if any) that will proceed
28 to trial, Defendant cannot reasonably estimate the length of trial. Defendant reserves its right
to object to a jury trial to the extent inappropriately requested on any given claim.

19. Disclosure of Non-party Interested Entities or Persons:

Plaintiff knows of no person, firm, partnership, corporation or other entity to have
either (i) a financial interest in the subject matter in controversy or in a party to the
proceeding; or (ii) any other kind of interest that could be substantially affected by the
outcome of the proceeding.

Defendant states as follows:

1. The parent company of Citibank, N.A. is Citicorp Holdings, Inc.;
2. Citicorp Holdings, Inc. owns 100% of the stock of Citibank, N.A.;
3. The parent company of Citicorp Holdings, Inc. is Citigroup Inc.; and
4. Citigroup Inc. owns 100% of the stock of Citicorp Holdings, Inc.

20. Other Matters:

Other than a mediation, Plaintiff does not know of any other matter that may facilitate the just, speedy and inexpensive disposition of this matter.

Defendant is open to informal discussions at this point but believes that it is premature for formal ADR at this time. Should informal discussions prove unsuccessful, Defendant will participate in the ADR procedures that seem most appropriate for this case.

Dated: November 25, 2009

Dated: November 25, 2009

/s/ DAVID C. PARISI
[Plaintiff's Counsel]

/s/ DEBRA BOGO-ERNST
[Defendant's Counsel]

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